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THE HONORARIA BAN:

CONGRESSIONAL COUP -- WORKERS' BURDEN

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Judge Advocate General's School, the United States Army, or any other government agency.

by Samuel D. Hawk

Major, U.S. Army

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44th Judge Advocate Officer Graduate Course

April 1996

THE HONORARIA BAN:

CONGRESSIONAL COUP -- WORKERS' BURDEN

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ABSTRACT: The honoraria ban, passed as part of The Ethics Reform Act of 1989, prohibited federal employees from accepting payment for any appearance, speech or article, no matter the topic. The ban applied to all employees, regardless of rank or pay grade, and included a 25% pay raise for Members of Congress, the Federal Judiciary, and senior Executive Branch officials. Congress, in passing this bill, was able to stem a tide of bad publicity from its own practices of honoraria acceptance while suffering no financial burden. Rank-and-file employees received no pay raise and many were forced to give up significant sources of income. The Office of Government Ethics implemented the ban for the Executive Branch and turned it into an overly-complex rule. The U.S. Supreme Court found that the ban violated the First Amendment, but only gave relief to the parties before the Court, a class of government employees, GS-15 and below. This left open questions of applicability. This thesis reviews the legislative history of the ban and the litigation, and recommends Congressional action in the wake of the Supreme Court opinion.

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CONGRESSIONAL COUP -- WORKERS' BURDEN

SAMUEL D. HAWK

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JUDGE ADVOCATE GENERAL'S CORPS

I. INTRODUCTION

No man but a blockhead ever wrote, except for money.[1]

Samuel Johnson

Congress passed the Ethics Reform Act[2] in November, 1989 with the laudable purpose of "restor[ing] public confidence in the integrity of government officials by promoting the highest professional and ethical standards in public service."[3] The bill dealt with a number of ethics issues,[4] and included a

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[1] J. BOSWELL, LIFE OF SAMUEL JOHNSON LL.D. 302 (1952), also quoted in United States v. National Treasury Employees Union, 115 S.Ct. 1003, n. 14 (1995).

[2] Pub. L. No. 101-94, 103 Stat. 1716(1989), codified at 5 U.S.C. app.§§ 501-505.

[3] REPORT OF THE BI-PARTISAN TASK FORCE ON ETHICS, 135 Cong. Rec. H 9253 (Nov. 21, 1989).

[4] The act also restricted outside employment of Congressmen and senior Executive Branch officials and limited the amount of outside income government workers can earn in addition to the honoraria ban. *See generally*, David A. Golden, Note, *The Ethics Reform Act of 1989: Why the Taxman Can't Be a Paperback Writer*, 1991 B.Y.U. L. Rev. 1025; and Robert S.

one-line provision that touched off years of controversy and litigation, "An individual may not receive any honorarium while that individual is a Member, officer or employee."[5] This provision, which became known as the "honoraria ban," applied to all employees of the Legislative, Judicial and Executive Branches, and included a pay raise for Congress, federal judges, and senior Executive Branch officials.[6] The broad ban effected all Executive Branch employees, no matter their rank or position, except enlisted military members,[7] but there was no commiserate pay raise for rank-and-file

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Collins, *Ethics and the First Amendment: The Applicability of the Honorarium Ban of the Ethics Reform Act of 1989 to the Executive Branch*, 62 Geo. Wash. L. Rev. 888 (1994).

[5] 5 U.S.C. app. § 501(b). "Officer or employee" is defined in § 505 of the act as "any officer of employee of the Government except any special Government employee (as defined in section 202 of title 18, United States Code)." Office of Government Ethics implementation of this statute clarified the definition to include military officers but not enlisted personnel (see 5 C.F.R. 2636.102(c)). § 505(c) of the act defined honorarium broadly to include "any thing of value for an appearance, speech or article" excluding travel expenses paid by another. In 1992, that language was amended to exclude any series of appearances, speeches, or articles unrelated to the employee's official duties or status (5 USC App. § 505(3) (1988 ed., Supp. V)).

[6] 5 U.S.C. app.§§ 501-505 *supra*, note 2. Those senior Executive Branch Officials were those paid amounts equal to and greater than GS-16. Throughout this paper, I will use the terms "senior Executive Branch Officials" and "senior officials" to denote this group, regardless of their pay schedule. The term also includes military flag officers - those in the pay grades O-7 and above.

[7] *Id.*

employees.[8] A close analysis of the legislative record reveals that the Congressional pay raise was the driving force behind the ban. The act staved off a wave of bad publicity about honoraria acceptance by Members of Congress and provided them with an opportunity to raise their pay while appearing ethical before the voters. They were able to improve their public image with little or no financial hardship. The record also reveals that the ban was extended to rank-and-file employees almost as an afterthought, with virtually no consideration as to the appropriateness of their inclusion.[9]

The honoraria ban instantly wiped out a potentially significant source of income for many federal employees who wrote and spoke on matters unrelated to their official duties. They were still allowed to speak, write, and be published, but they could not be paid for their efforts. This act denied most employees the pay raise that senior officials enjoyed, and, as courts would later hold, deprived the public of hearing and reading about the intellectual pursuits of

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[8] *Id.* Throughout this thesis, I will use the terms "rank-and-file employees" and "low and mid-grade employees" as terms of art to denote Executive Branch employees who are paid at rates equal to and less than GS-15, regardless of their pay schedule. The term also includes military officers in the pay grades of O-6 and below.

[9] See section II of this thesis for detailed legislative history of the Ethics Reform Act of 1989.

thousands of Americans.[10] Federal employees found themselves forced to be "ethical" through bright-line rule-making, rather than through broader concepts of ethical behavior and ethical self-restraint.

The honoraria ban came under attack before it even became effective. Two unions and several government employees brought suit over it.[11] It was attacked as both underinclusive and overinclusive, violative of the 1st amendment to the U.S. Constitution, and just plain unfair to federal workers. It was specifically attacked as unfair to low and mid-grade workers who had not received the pay raise and did not wield great power and influence.[12] There were several failed Congressional attempts to reform the honoraria ban. Bills were introduced in both the Senate and the House of Representatives shortly after the litigation began.[13] A House

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[10] United States v. National Treasury Employee's Union, 115 S. Ct. 1003 (1995) [hereinafter NTEU], at 1015.

[11] *Id.*, at 1010.

[12] Mike Causey wrote a series of articles in his *Federal Diary* column in *The Washington Post* tracking the legislation through Congress and the Courts. He championed the cause of the rank-and-file worker unfairly affected by this legislation. See section V of this thesis for a detailed account of the controversy generated by the ban, including a discussion of Causey's and other newspaper articles.

[13] S. 3195, 101st Cong., 2nd Sess. (1990); and H.R. 325, 102nd Cong., 1st Sess. (1991). For a detailed discussion of these bills, which failed to be enacted, see section VI of this thesis.

bill was introduced shortly after the Supreme Court finally decided the matter.[14]

On February 22, 1995, in the case of *United States v. National Treasury Employees Union* (hereinafter, *NTEU*), the Supreme Court struck down the honoraria ban on 1st Amendment grounds. Its decision, however, only applied to the parties before it, the class of Executive Branch employees in the pay grades of GS-15 and below.[15] The decision raised significant issues, specifically as to applicability of the ruling and the ban to other affected employees. It left Congress, the Office of Government Ethics, and agency ethics officials unsure how to proceed.

The U.S. Department of Justice (hereinafter, DOJ) attempted to answer some of the questions raised by the Supreme Court in *NTEU* in a memorandum of February 26, 1996.[16] Assistant Attorney General Walter Dellinger, the author of the opinion, stated that the Supreme Court had "effectively

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[14] H.R. 1639, 104th Cong., 1st Sess. (1995). For detailed discussion of this bill, which has not been enacted, see section VI of this thesis.

[15] NTEU, *supra*, note 10, at 1019.

[16] Memorandum, U.S. Dept. of Justice Office of Legal Counsel to the Attorney General of the United States, re: Legality of Honoraria Ban following U.S. v. NTEU (Feb. 26, 1996) [hereinafter, DOJ memorandum].

eviscerated" the ban and that it could not be enforced against any employee from any branch of government, regardless of rank or pay grade.[17] This opinion was not in keeping with the intent or spirit of the *NTEU* decision. It constituted, in effect, an Administration position that it will not follow a Supreme Court decision that it finds difficult to enforce. Only Congressional action can now resolve the matter.

This thesis will address the ambiguities of *NTEU* and the DOJ interpretation and will propose a course for Congress to now follow in regulating expressive activity outside the federal workplace. The honoraria ban should not be resurrected for rank-and-file employees of the Executive Branch. For senior employees, a modified form of the ban should apply, one that is tightly-crafted to pass muster under *NTEU*. The proposal will be clearer and more concise than the old ban, and will eliminate loopholes and meaningless distinctions among types of speech.

Critical to understanding this thesis is an examination of the legislative history of the honoraria ban as part of the Ethics Reform Act of 1989. The role of Congress serves as both justification and basis for the proposed re-written honoraria ban. The Office of Government Ethics (hereinafter, OGE) played a role in implementing the ban in the Executive

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[17] *Id.*

Branch, and this will also be examined. The rule, as implemented, was even more complex than what one Congress passed.

II. LEGISLATIVE HISTORY OF THE ETHICS REFORM ACT OF 1989

In the late 1980s, Congress was feeling pressure from negative public opinion. Media reports and polls indicated that the public questioned lawmaker's ethics, particularly the influence of special interest groups, and public confidence was at a low ebb.[18] *The Wall Street Journal* reported that for years, lawmakers had shrugged off ethical and legal questions raised from accepting personal-appearance fees from lobbyists, but that a poll indicated that nearly two-thirds of those surveyed favored outlawing honoraria, which had reached $10 million in 1987.[19] The news media reported the results of Congressional financial disclosure reports, carefully pointing out the large payments Congressmen received as honoraria.[20] Aides to House Speaker Jim Wright of Texas and Minority Leader Robert Michel of Illinois pocketed $28,000.00 in honoraria during a well-publicized two-day trip to Oklahoma and Texas in

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[18] Golden, *supra*, note 4, at 1026.

[19] Brooks Jackson, Wall St. J. (Nov. 1, 1988) at 1. The poll was a Wall Street Journal/NBC News Poll.

[20] Don Phillips, Eric Pianin, *Many House Leaders Keep Maximum Honoraria; House Leaders Eager for Honoraria in 1988, Financial Records Show*, Wash. Post, May 23, 1989, at A1.

1987.[21] Newspaper accounts were full of lurid headlines about honoraria "Trickle[ing] Down" to Congressional staffers[22] and aides riding the "Gravy Train."[23] This was the last straw. Reform became an imperative.

There was already a patchwork of existing laws in place to regulate outside earned income, including honoraria. House Rule XLVII limited outside income to 30 percent of annual Congressional salary. 2 USC 441i (repealed in 1991), which applied to the entire Federal Government, limited honoraria to $2,000 per speech, appearance, or article. 2 USC 31-1 (also repealed in 1991) limited annual honoraria for Members of Congress (both houses) to 40 percent of their annual salary. Amounts over these limits could be given to charity. Clearly, these were not strong enough to stem the tide of well-publicized abuses.

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[21] BRIEF OF *AMICUS CURIAE* COMMON CAUSE IN SUPPORT OF PETITIONERS, at 10, NTEU, *supra*, note 10.

[22] John E. Yang, *Bounty of Special Interest Groups, Trickle Down to Some Congressional Staffers*, Wall St. J., May 26, 1989, at A 12.

[23] Carol Matlack, *Gravy Train*, Nat'l J., Jan 28, 1989, at 257. BRIEF OF COMMON CAUSE, *supra*, note 21, includes an exhaustive list of articles treating honoraria as akin to bribery. Ironically, although the Common Cause brief was in support of preserving the broad honoraria ban, the abuses it cited all involved Congress.

A. COMMISSION REPORTS

Both the White House and Congress attacked the issue by appointing commissions to study the problem. The President appointed the Commission on Federal Ethics Law Reform. At the same time, the Commission of Executive, Legislative and Judicial Salaries, also known as the Quadrennial Commission, was considering the issues involved in Government compensation. In Congress, Speaker Wright and Representative Michel appointed the Bipartisan Task Force on Ethics.

The first report was *Fairness to Our Public Servants*, issued by the Quadrennial Commission, in December, 1988.[24] Honoraria was discussed under the heading "The Legislative Branch," and was defined as "Payments for public appearances to deliver a talk or engage in a colloquy at the invitation of some non-governmental group, often one with a material interest in pending or anticipated legislation."[25] Written work was not included in the definition. The language made clear that it was concerned with Congressional ethics and direct conflicts of interest. It went on to discuss members of Congress accepting honoraria, and Congressional attempts to

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[24] FAIRNESS FOR OUR PUBLIC SERVANTS: REPORT OF THE 1989 COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES (Dec. 1988).

[25] *Id*, at 24.

control it. It stated that "[T]he only principled argument that can be made for the practice of accepting honoraria is that official salaries are far too low and must be supplemented by honoraria so that a public official can meet his family obligations." It said that "once official compensation is made adequate, there is no semblance of justification for the continuation of honoraria."[26] Those recommended salary increases were reserved for the "senior members" of the three branches of government.[27] Clearly, the Commission was only concerned about receipt of honoraria by senior officials, particularly members of Congress, and only intended the ban to extend that far. The Report concluded with the following statement:

> Talented men and women at all income levels can and do make valuable contributions to our federal public service. Just as we need their talents, they deserve to be equitably compensated for the service they render and for the contributions they make for the public good. Fairness to them is in the self-interest of us all.[28]

These concepts of fairness for federal employees and recognition for the contributions they make for the public

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[26] *Id.*

[27] *Id, at 3.*

[28] *Id*, at 31

good, along with the distinction between senior and junior employees got lost in the shuffle of commission reports and Congressional action. This loss lead to the honoraria ban's eventual downfall as unconstitutional.

The next report, issued in March, 1989, was *To Serve with Honor: Report of the President's Commission on Federal Ethics Law Reform* (commonly known as the Wilkey Commission).[29] Former Attorney General Griffin Bell, the Commission's Vice Chairman, had previously called the practice of accepting honoraria "evil" and was concerned that "[I]t undermines confidence in government."[30] The report made the sweeping recommendation that federal employees in all three branches "be prohibited from receiving honoraria."[31] For the first time, lower-ranking federal employees were included in the ban recommendation. The Commission report noted no problems with lower-ranking Executive Branch employees receiving honoraria, and, like the Quadrennial Commission, seemed much more concerned about outside earned income of senior officials. It was quite concerned with the "lack of uniformity" across the three branches of government in rules governing honoraria and

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[29] TO SERVE WITH HONOR: REPORT OF THE PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM (March, 1989).

[30] Walter Pincus, *Ethics Panel Tentatively Backs Honoraria Ban in Top Jobs*, Wash. Post (February 23, 1989) at A1.

[31] TO SERVE WITH HONOR, *supra*, note 29, at 33.

outside income,[32] and based its recommendation largely on this, but apparently did not consider that different rules for different classes of employees might be justifiable. It noted, for example, that it was aware of "no special problems associated with receipt of honoraria within the judiciary,"[33] but in the interests of uniformity among the branches, recommended that it, too, be subject to the ban.

The Wilkey Commission noted that receipt of honoraria from private interests can give the impression of increased access to public officials, and backed up this proposition by quoting the Quadrennial Commissions finding that "public faith in the integrity of the Members it elects is threatened by the steady growth of this practice."[34] The concern, clearly, was with Members of Congress. The Commission stated its strong feelings that "the current ailment" (acceptance of honoraria) is serious and that the "bitter medicine" of an across-the-board ban was necessary. It then recommended a pay raise for "top officials" in all three branches of government in addition to the honoraria ban.[35] Once again, a report

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[32] *Id*, at 35.

[33] *Id*.

[34] *Id*.

[35] *Id*. at 38.

recommended cutting off a source of income for rank-and-file employees coupled with a pay raise for senior officials.

The Commission adopted the Quadrennial Commission's definition of honoraria, "payments for public appearances to deliver a talk or engage in a colloquy at the invitation of some non-government group."[36] Payment for writing was, once again, not included in the definition. In fact, the Commission praised the practice of federal employees writing scholarly articles and novels, treating it as outside employment, governed by 18 USC 209,[37] the salary supplementation statute, and not falling within the realm of honoraria.

The Congressional Bipartisan Task Force issued its report in November 1989, and made it clear that the honoraria ban debate was about Congress and its concern with public opinion, yet it proposed a bill banning the receipt of honoraria in all three branches of government.[38] In fact, the purpose of the Task Force was to review the rules, regulations, and statutes governing the official conduct of members of the House of

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[36] *Id*, at 35.

[37] 18 U.S.C. § 209 is a criminal statute that prohibits federal employees from receiving pay supplements or benefits from any source other than the United States for the performance of official duties unless specifically authorized by law.

[38] REPORT OF THE BI-PARTISAN TASK FORCE ON ETHICS, *supra*, note 3.

Representatives. The Executive Branch, particularly rank-and-file employees, got swept up into the honoraria debate seemingly seemingly for no reason. The report offered real support only for a Congressional ban, stating that "[T]he controversy over outside earned income focuses primarily on honoraria fees accepted by members of Congress."[39] It noted that in 1987, Members of the House and Senate had received a combined total of $9.8 million in honoraria, including $3 million donated to charity.[40] The Report dealt at great length on the negative public perception that honoraria allows special interest groups to gain access to Members of Congress. It contained no evidence that consideration was given to any problems with honoraria earned by Executive Branch employees. The report expanded the definition of honoraria to include payment for writing articles, something that the previous two commissions, on which the Task Force relied so heavily, had not done. The report also recommended 25% pay raises for members of the House of Representatives, many members of the federal judiciary, and Executive Branch employees on the Executive Schedule.[41]

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[39] *Id*, at 15.

[40] *Id*

[41] *Id*.

B. CONGRESSIONAL ACTION

Before issuance of the Task Force's report, there were several attempts in Congress to ban honoraria which would have only affected the Legislative Branch. On January 3, 1989, Representative Charles E. Bennett, Democrat of Florida, proposed a bill to prohibit Members of Congress from accepting honorarium, except reimbursement for travel and the cost of two days' lodging. There was no accompanying pay increase. It was not enacted.[42] On February 2, Representative Peter Hoagland, Democrat of Nebraska, submitted a bill to prevent or nullify the pay increases recommended by the Wilkey Report with respect to the Executive and Legislative branches, and to ban Congressmen from accepting honoraria. It, too failed to pass.[43]

The Ethics Reform Act of 1989, with its sweeping ban and accompanying pay raises, passed the House of Representatives "with astounding speed in a bipartisan lockstep."[44] This Act amended Title V of the Ethics Reform Act of 1978 to prohibit

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[42] H.R. 75, 101st Congress, 1st Sess. (1989).

[43] H.R. 785, 101st Congress, 1st Sess. (1989).

[44] Don Phillips, *Hill Votes Pay, Ethics Package; Measure Includes Smaller Raise for Senators*, Wash. Post., Nov. 18, 1989, at A1.

all officers and employees of the federal government from receiving honoraria for any appearance, speech, or article. The effective date of the ban was January 1, 1991.[45]

Congressional debates and contemporary newspaper accounts made clear that reforming the ethics of Executive Branch employees was not the point of this legislation. There was another dynamic at play here, and that was a Congressional pay raise. Many commentators, and some Representatives and Senators themselves, saw ethics reform, particularly the honoraria ban, as nothing more than an attempt to make pay raises more acceptable to the American public. Robert S. Collins, in his excellent article in the *George Washington Law Review* summed it up nicely when he said:

> [A]lthough prompted by ethical concerns, this legislation served to make a significant pay increase for Congress more palatable to the public. Arguably, the House, the Judiciary, and senior government officials 'accepted' a ban on honoraria in exchange for a pay increase.[46]

Newspaper accounts were blunt in their assessment of the bill as a pay raise couched in the palatable terms of ethics reform. *House Leaders Plan Another Try at Fat Pay Raise by*

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[45] § 501(b), *supra*, note 5.

[46] Collins, *supra*, note 4, at 891.

Thanksgiving was a typical headline.[47] That article quoted Representative Tom Petri, Republican of Wisconsin, giving the following radio interview:

> I'm all for tightening those [honorarium] restrictions, but we shouldn't have to be bribed [with] a big salary increase in return, [Mr. Petri said]. This is yet another proposal to give congressmen and senators a big pay raise in return for tight restrictions on the big speaking fees we can get saying a few words at meetings and conventions put on by special interest groups.[48]

The Senate was more skittish than the House to embrace a pay raise and give up honoraria. *USA Today* struck at the heart of Senate reluctance when it reported that they were allowed to keep up to 40 percent of their pay in speaking fees under the then-current rules, compared to 30 percent in the House.[49] The Senate version contained an amendment which would act to restore honoraria in the event the pay increase was defeated. Senator Jesse Helms, Republican of North Carolina, was quite straightforward in his assessment of the bill. The amendment, which he supported, would, he said,

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[47] Valerie Richardson, *House Leaders Plan Another Try at Fat Pay Raise by Thanksgiving*, Wash. Times (Nov. 10, 1989), reprinted in 135 Cong. Rec. S15966, at S15975.

[48] *Id.*

[49] Richard Wolf, *Congress Looks Anew At Pay*, USA Today (Nov. 10-12, 1989), republished in 130 Cong. Rec. S15966, at S15975.

"remove any doubt in the minds of anybody across this country about whether we are in fact voting on a pay raise or whether we are voting on a so-called ethics package."[50] He said that the effect of the amendment was to "expose all this claptrap that this is really an ethics bill. It is not an ethics bill. It is a pay raise bill. I think we ought to look at it as that."[51]

Senator George Mitchell, Democrat of Maine, attempted to steer the debate back on track and stated his firm belief that honoraria should be banned and that Senator Helms' amendment would continue the honoraria system. He said "every Senator here knows that this current system cannot and will not continue indefinitely into the future."[52] During all this debate, there was no discussion of acceptance of honoraria by rank-and-file Executive Branch employees.

The Senate passed the bill, but Senators, Senate employees, and special government employees were exempt from its provisions.[53] The Senate accepted a smaller pay raise

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[50] 135 Cong. Rec. S15966, at S15972 (Nov. 17, 1989)(statement of Sen. Helms).

[51] *Id.*

[52] 135 Cong. Rec. S15966, at S15972 (Nov. 17, 1989)(statement of Sen. Mitchell).

[53] § 501(b), *supra*, note 5.

(10%) and voted to phase out honoraria on almost a dollar-for-dollar basis as their received cost-of-living increases.[54]

The Senate finally faced the issue of honoraria and an accompanying pay raise head-on when it passed the Congressional Operations Appropriations Act of 1992.[55] Senator Robert Byrd, Democrat of West Virginia, championed the bill and convinced enough Senators to vote for a pay raise in exchange for a ban on accepting honoraria. The bill passed, although barely.[56] An earlier bill introduced by Senator Dennis De Concini, Democrat of Arizona, to extend the honoraria ban to the Senate without an accompanying pay raise was not enacted.[57]

The Senate's self-imposed ban went into effect on August 14, 1992, and there was a rush to accept fees for speeches and appearances just before the cut-off. *The Washington Post* reported that eleven Senators collected and kept the full amount allowable for a full year under the then-current rules: $23,068 over charitable contributions. Twenty-one others kept

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[54] Phillips, *supra*, note 44, at A1.

[55] 5 USC § 5318.

[56] Helen Dewar, *Swift, Stealthy Coup Raised Senate Pay; Byrd Marshaled Votes Before Opponents Had Time to Organize*, Wash. Post. (July 19, 1991), at page A1.

[57] S 56, 102nd Congress, 1st Sess. (1991).

at least $20,000. The article reported that the Senators would now receive a pay raise from $101,900.00 to $125,100.00, "a trade-off based on the assumption that government is better served when lawmakers are paid by taxpayers instead of special interests."[58]

III. OFFICE OF GOVERNMENT ETHICS CODIFICATION

Section 503(2) of the Ethics Reform Act of 1989 gives administrative responsibility for implementing the act in the Executive Branch to the Office of Government Ethics (OGE) and makes Executive Branch employees subject to its rules and regulations. OGE implemented the honoraria ban extensively in 5 CFR § 2636.201 *et seq.*

OGE is an independent federal government agency created by the Ethics in Government Act of 1978[59] and charged with responsibility for implementation and leadership of the Executive Branch ethics program.[60] Two things occurred in 1989 and 1990 that put OGE into high hear. One was the passage of

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[58] Helen Dewar, *More than 30 Senators Collected Honoraria Limit Before Ban*, Wash. Post (June 13, 1992) at A6.

[59] Pub. L. 950521, as amended.

[60] See 5 CFR part 2638 for OGE and Executive Branch ethics program and responsibilities.

the Ethics Reform Act of 1989. The second was the issuance of Executive Order 12674, stating new, reformed Principles of Ethical Conduct for Government Officers and Employees.[61] It gave OGE the responsibility for promulgating a new set of regulations that "establish a single, comprehensive, and clear set of Executive Branch standards of conduct that shall be objective, reasonable, and enforceable.[62] OGE was ordered to put them into an ethics manual, and was given responsibility for ensuring that any implementing regulations issued by Executive agencies were consistent with the Executive Order.[63] This was quite a job for the small agency. Different Executive agencies had issued their own standards of conduct regulations, including each branch of the military.[64] They were all based on the same statutes, including the Ethics in Government Act of 1978 and the conflict of interest statutes in Title 18, U.S. Code,[65] but there was no common source where

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[61] Exec. Order No. 12674, April 12, 1989, *reprinted as amended by Exec. Order No. 12731 in* 55 Fed. Reg. 42547 (1990)

[62] *Id*, at § 201.

[63] *Id*.

[64] DEP'T OF ARMY REG. 600-50, STANDARDS OF CONDUCT (20 Jan. 1988) [hereinafter, AR 600-50]; DEP'T OF AIR FORCE REG. 30-30, STANDARDS OF CONDUCT (May 1988); AND DEP'T OF NAVY, JUN. SECRETARY OF THE NAVY INSTR. 5370.1B, STANDARDS OF CONDUCT (30 Jun. 1986).

[65] 18 USC § 201 *et seq*. is a series of criminal conflict of interest statutes applicable to the Executive Branch. They include § 201(b), which prohibits bribery; § 203, which prohibits receiving compensation for representational services before any U.S. Government agency in matters in which the U.S.

any employee could look for guidance on ethics. OGE set out to provide that single source, and did so with the issuance of its *Standards of Ethical Conduct for Employees of the Executive Branch,* published in August 1992, with an effective date of February 3, 1993.[66]

OGE published The *Standards of Ethical Conduct* in a handy manual that included part I of Executive Order 12674, stating general principles of ethical conduct, and the whole of 5 CFR part 2635, the new OGE rules. 5 CFR § 2635.101 defined the basic obligation of public service, reminding government employees that public service is a public trust. These general provisions were, for the most part, nothing new, but included some new twists. For example, for the first time employees were admonished to disclose waste, fraud, abuse and corruption; and were reminded that they must put forth honest effort in the performance of their duties.[67] The manual also included guidance on gift acceptance, conflicting financial

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is a party or has a substantial interest; and § 205, which prohibits acting as an agent or attorney for anyone regarding any claim against the U.S. They also include § 209, *supra*, note 22, which prohibits salary supplementation; and § 208, conflicts of financial interest, that prohibits employees from participating in official matters in which they have a financial interest. These statutes are all implemented and interpreted extensively by OGE at 5 CFR § 2635.101 *et seq*.

[66] 5 CFR part 2635.

[67] 5 CFR § 2635.101.

interests, impartiality in performing official duties, seeking other employment, misuse of position, and outside activities.[68]

The honoraria ban was not set out in the *Standards of Ethical Conduct*. It was simply alluded to as part of a list of statutes cited in the Outside Activities subpart.[69] The reader was told that employees may not receive any compensation for an appearance, speech, or article and was referred to the statutory cite and to the OGE regulation at 5 CFR §§ 2636.201 through .205. Part 2636, containing the ban, was not included in the manual.

The OGE manual also contained a provision for agency supplementation.[70] Agency-specific supplements had to be submitted to OGE for its concurrence and joint issuance. Supplemental agency regulations would only become effective upon concurrence and co-signature by OGE and publication in the Federal Register.[71] All this was in keeping with OGE's original Presidential mandate to "establish a single, comprehensive, and clear set of executive branch standards of conduct."[72] Department of Defense (hereinafter, DOD) ethics

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[68] 5 CFR part 2635, *supra*, note 66.

[69] 5 CFR § 2635.801.

[70] 5 CFR § 2635.105.

[71] *Id.*

[72] Exec. Order No. 12674, *supra*, note 61.

attorneys immediately began work on a DOD supplement. The need for this was obvious, if for no other reason than § 2635.103 of the new standards, "[A]pplicability to members of the uniformed services." This section provided that the new rules were not applicable to enlisted members, and the military was directed to issue regulations defining the ethical conduct obligations of enlisted. This put the military in general, and the Army in particular, in a bind. The new OGE regulations effectively, though not technically, superseded the old standards of conduct regulations, such as the Army Regulation 600-50 (hereinafter, AR 600-50). AR 600-50's provisions, applicable to officers, civilians, and enlisted, were outdated, old law.[73] AR 600-50 would remain in effect until the DOD could issue its supplement, but handling standards of conduct violations by enlisted personnel became quite problematic.

Military and civilian attorneys worked together to draft a comprehensive supplement specific to the DOD. This work produced Department of Defense Directive 5500.7, *Standards of Conduct*, and Department of Defense Regulation 5500.7-R, *The Joint Ethics Regulation* (hereinafter, the JER),[74] both of which

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[73] AR 600-50, *supra*, note 64.

[74] DEP'T OF DEFENSE REG. 5500.7-R, THE JOINT ETHICS REGULATION (30 Aug. 1993) [hereinafter DOD 5500.7-R].

were signed by Secretary of Defense Aspin on August 30, 1993, and became effective immediately. The JER officially superseded all separate service standards of conduct regulations, and the Directive stated the new policy that the DOD "shall have a single source of standards of conduct and ethics guidance."[75] The JER is a vast, comprehensive document, including a reprinting of all of 5 CFR part 2635 (all of the *Standards of Ethical Conduct*) and 5 CFR part 2636, outside employment and the honoraria ban. It also contained 5 CFR part 2634, financial disclosure; 5 CFR part 2637, post-employment conflicts of interest; 5 CFR part 2638, OGE and agency responsibilities; and additional DOD supplementation of all of them. The JER also included a complete, and soon to be outdated, chapter on political activities;[76] Executive Order 12674, and various appendices.

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[75] *Id*, at § D.1.

[76] Chapter 6 of the DOD 5500.7-R, Political Activities of Federal Employees, included complete guidance on the old Hatch Act, 5 USC § 7321 *et seq.* Soon after the JER's implementation, the Hatch Act Amendments were passed, greatly expanding the permissible political activities of civilian Executive Branch employees, and rendering much of chapter 6 outdated and useless. Change 1 to the JER, which included replacement pages for chapter 6, were issued the next year, in November 1994. The political activities of military personnel were not effected by these changes, as the Hatch Act is only applicable to civilians. Political activities of military personnel continue to be governed by DODD 1344.10 (June 1990), implementing service regulations, and various statutes.

DODD 5500.7 made 5 CFR 2635, the old OGE manual, applicable to enlisted members, and the JER defined "DOD employee" as including enlisted.[77] 5 CFR part 2636, including the honoraria ban, was not made applicable to enlisted, so the honoraria ban remained applicable to civilian employees and military officers only, as the statute dictated.[78]

IV. THE HONORARIA BAN IN FINAL FORM IN THE JER

Chapter three of the JER is the final distillation of the Quadrennial Commission, the Wilkey Commission, the Bi-Partisan Task Force, the efforts of Congress, OGE and DOD - reams of paper and years of work. The chapter is titled Activities With Non-Federal Entities and section 1 consists of the OGE rules for the honoraria ban and restrictions on outside earned income, with no DOD supplementation.[79] The ban was made uniform for the entire Executive Branch. The OGE rule begins with the simple statement "[A]n individual may not receive any honorarium while that individual is an employee."[80] "Employee"

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[77] DOD 5500.7-R, *supra*, note 73, at § 1-211.

[78] § 501(b), *supra*, note 5.

[79] 5 CFR § 2636.201 through 205 contains the honoraria ban. It is followed immediately in DOD 5500.7-R by § 2636.301 through .307, restrictions on outside earned income, and preceded by § 2636.101 through .104, general provisions, including definitions, applicable to both.

[80] *Id*, at § 2636.201.

is defined as "any officer or employee of the executive branch," other than special government employees defined in 18 USC 202" (therefore it does not generally apply to the Reserve Components). It includes officers but not enlisted members of the military. It also does not apply to the President and Vice President.[81]

The definition of employee, particularly as it addresses the military, reveals the ignorance and lack of forethought by the drafters of the statute. It was made applicable only to officers, not enlisted members, implying an attempt to reach those decision-makers with the most influence. However, in its broad sweep toward civilians and its more limited sweep toward the military, it missed the mark. The Command Sergeant Major of the Army (SMA), a man of considerable power and influence, was exempt from the ban, while a freshly-minted Second Lieutenant was covered. More absurdly, a civilian custodian mopping the floor at an Army post was also covered. It is hard to imagine evil influence-peddlers seeking to compromise the integrity of that custodian, but it is easy to understand that the SMA could be their target. Congress, in its rush to get a pay raise and stave off bad publicity, either did not understand the military and civilian employment structures, or did not consider them.

[81] *Id*, at § 2636.102(c).

Federal employees seeking guidance on acceptance of honoraria must wade through an OGE rule in excess of five pages, not counting the general provisions. The rule, as drafted, is a stunning example of obfuscation and "legalese." Many other rules are described, often as warnings, but, for no apparent reason, are not named.

Employees, once determining that they indeed meet the definition of "employee," are first reminded that the honoraria ban is in addition to any other "restriction on appearances, speaking or writing or the receipt of compensation therefor to which an employee is subject under applicable standards of conduct or by reason of any statute or regulation relating to conflicts of interests."[82] If an employee determines that compensation for a planned activity is not prohibited by this subpart, she must still refer to other statutes and regulations, conveniently set out in § 2636.202(a) through (c). The employee is restricted by "criminal statute" (18 USC 209, inexplicably not named) from accepting compensation for appearances, speeches, or articles made as part of her official duties, unless there's a statutory exception. She is prohibited by "the standards of conduct" (§ 2635.807, again inexplicably not named) from receiving compensation, including travel expenses, for speaking or writing that focuses specifically on her official

[82] *Id*, at § 2636.202.

duties or "the responsibilities, policies, and programs" of her employing agency. Finally, she is reminded that "certain noncareer employees are subject to limitations on their receipt of outside earned income and may not engage in compensated teaching activities without advance approval under § 2636.307 of [subpart C]." She is, at least, given a specific reference to find out if she is one of the "certain noncareer employees" so restricted.[83]

Honoraria which is prohibited by the ban can be paid on the employee's behalf to a charitable organization, and any honoraria so contributed to charity is deemed not to have been received by the employee. The employee may not take a tax deduction for the contribution.[84] However, charitable contributions may not be made for honoraria received in violation of other standards of conduct statutes or regulations, such as § 2635.807 (described, but, inexplicably not named). Charitable contributions also may not be made for amounts over $2,000.00 per appearance, speech, or article; or if the employee's "parent, sibling, spouse, child, or dependent relative derives any direct financial benefit" from the charity other than "any general benefit conferred by the organization's activities."[85] "Dependent relative" and

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[83] *Id*, at § 2636.202 (a)-(c).

[84] *Id*, at § 2636.204(a).

[85] *Id*, at § 2636.204(b).

"general benefit," are not defined and are among the many ambiguities left up to employees and ethics counselors to decipher.

This section on "[P]ayments to charitable organizations in lieu of honoraria" is followed by another "monument to clarity," "[R]eporting payments to charitable organizations in lieu of honoraria."[86] Any "current or former employee, other than a new entrant," who must file a public or private financial disclosure report must, at the same time, file a confidential report of payments to charities in lieu of honoraria if:

> (1) Payments in lieu of honoraria aggregating more than $200.00 were made on his behalf by any one source to one or more charitable organizations during the reporting period covered by the financial disclosure statement; or
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> (2)In the case of an individual filing a termination report, there is an understanding between the reporting individual and any other person that payments in lieu of honoraria will be made on his behalf for an appearance or speech made or article submitted for publication while the individual was a Government employee which, together with any payments in lieu of honoraria made by that source during the reporting period, will aggregate more than $200.00. This reporting requirement is in addition to any other requirement to disclose on a public or confidential financial disclosure

[86] *Id*, at § 2636.205.

> report the source, date and amount of an honorarium paid to a charitable organization on the employee's behalf. It does not apply to any payment in lieu of an honorarium made to a charitable organization on behalf of the current or former employee's spouse or dependent child.[87]

Further information on where, what, and when to file follows for a page and a half. The Standard Form 450 and the Standard Form 278 are the financial disclosure reports described, but inexplicably not named. They are covered in detail in 5 CFR part 2634 and chapter 7 of the JER, but this guidance is also inexplicably left out.[88] It is passages like this that have led more than one wag to dub the OGE rules and the JER "the attorney's full employment act."

The definition of honorarium takes three pages and is very broad. The definition in the rule is critical to anyone trying to understand what is prohibited because "honorarium" is a term of art that bears little relation to the proper meaning of the word. If our intrepid employee were to look in a dictionary for guidance, she would find something like this: "a payment as to a professional person for services on which *no fee is set or legally obtainable*[emphasis added]".[89] In other words, an honoraria is akin to a gift; something which

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[87] *Id*, at § 2636.205(a).

[88] *Id*.

[89] WEBSTER'S NEW WORLD DICTIONARY, SECOND COLLEGE EDITION (1974).

the payer is not legally bound to pay. By contrast, the OGE rule (and the statute) defines honorarium to include payments for services for which fees are normally paid. The term is defined as "a payment of money or anything of value for an appearance, speech or article."[90] The terms "honorarium," "appearance," "speech," and "article" are defined more by what they do not include than by what they do. "Appearance" is defined as:

> attendance at a public or private conference, convention, meeting, hearing, event or other gathering and the incidental conversation or remarks make at that time. Unless the opportunity was extended to the employee wholly or in part because of his official position, the term does not include performances using an artistic, athletic, or other such skill or talent or primarily for the purpose of demonstration or display.[91]

This is further illuminated by a series of examples, including the following unlikely scenario: "[B]ecause the fee is for an 'appearance,' an employee of the Securities and Exchange Commission who was responsible for a major securities fraud investigation may not accept a fee for standing in the reception line at the premier for a movie entitled 'Junk Bond Scandal.'"[92]

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[90] 5 CFR § 2636, *supra*, note 79, at .203(a).

[91] *Id*, at § 2636.203(b).

[92] *Id*, .203(b), Example 1.

"Speech" is defined as:

> an address, oration, or other form of oral presentation, whether made in person, recorded or broadcast. Unless the opportunity was extended to the employee wholly or in part because of his official position, the term does not include the recitation of scripted material, as for a live or recorded theatrical production, or any oral presentation that is an incident of any performance that is excluded from the definition of an appearance in paragraph (b) of this section. It does not include the conduct of worship services or religious ceremonies.[93]

The following so-called "clarifying" example of "speech" fully exemplifies the ridiculous nature of the honoraria ban. "An attorney employed by the Department of Justice may not receive a $50.00 honorarium for her informal talk to a local gardening club on how to design and grow a Victorian rose garden. Her talk, though informal, is a 'speech.'"[94] The danger of a rule as absolute and overbroad as the honoraria ban is that it turns something as innocuous as a presentation to a garden club into a conflict of interest minefield. It invades employees' private lives to the point that they must be constantly, and needlessly, vigilant.

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[93] *Id*, at § 2636.203(c).

[94] *Id*, at .203(c), Example 1

Another example of "speech" involves a federal employee who is a stand-up comedian "by avocation" who may accept a fee for performing a comedy routine. This is not a "speech" because it is "an incident of his performance using his talent as a comedian." He could not, however, accept compensation for a speech just because he tells an "introductory joke or otherwise amuses the audience"[95] (thereby closing a loophole for politicians everywhere).

"Article" is defined as "a writing, other than a book or a chapter of a book, which has been or is intended to be published or republished in a journal, newspaper, magazine, or similar collection of writings." The term does not include works of fiction, poetry, lyrics, or scripts.[96] "Book," "chapter of a book," "fiction," "poetry," "lyrics," and "scripts" are not defined, ignoring the often blurred line between fiction and non-fiction, poetry and prose. The employee (and her ethics counselor) must decide what constitutes a book, or whether a part of a book, published in a journal, is allowed. The examples do not address the ambiguities of the definition, but merely illustrate the obvious. The following is typical: "[T]he lyrics and music for a college song written by two Department of the Navy

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[95] *Id*, at .293(c), Example 2.

[96] *Id*, at § 2636.203(d).

attorneys does not constitute an 'article.' The attorneys could each accept a gratuitous payment of $50.00 if the song were selected by their alma mater for publication in its compendium of college songs."[97]

The term "honorarium" itself is also defined by what it is not. The definition is followed by a list of 13 exemptions from the term. Significantly, "honorarium" does not include travel expenses for an employee and one relative incurred in connection with an appearance, speech, or the writing or publication of an article. The rule requires that the amount of an honorarium be determined by subtracting "actual and necessary" travel expenses in the event they were not provided. Exactly what constitutes "actual and necessary" travel expenses is left up to the employees and ethics counselors.[98]

"Honorarium" also excludes actual expenses associated with appearing, speaking, or writing; teaching a course as part of a "regularly established curriculum of an institution of higher education;" compensation associated with an employee-employer relationship, as opposed to that of an independent contractor or an agent or speaker's bureau; and

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[97] *Id*, at .203, Example 2.

[98] *Id*, at § 2636.203(a)(4).

awards "made on a competitive basis under established criteria."[99]

Possibly the most bizarre exemption from the term "honorarium" is the following: "[P]ayment for a series of three or more different but related appearances, speeches, or articles, provided that the subject matter is not directly related to the employee's official duties and that the payment is not made because of the employee's status with the Government."[100] In other words, an employee can not receive compensation for giving a presentation on rose gardening to a garden club. However, she can accept compensation for giving a series of three or more presentations on gardening to the same garden club. Three talks on gardening apparently pose less of a conflict of interest threat than one. More significantly, this exemption contains a nexus test, recognizing that the conflict of interest threat comes from honoraria related to the employee's official status or official duties. One speech is banned no matter the topic, but a series is banned only if it poses a direct conflict of interest.

Several examples attempted to explain this exemption. Clearly, the language that the series must be "different but

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[99] *Id*, at § 2636.203(a)(5),(7),(9), and (10).

[100] *Id*, at § 2636.203(a)(13).

related" was intended by the drafters to be an important distinction, as illustrated by example 3:

> An economist employed by the Department of the Treasury has entered into an agreement with a speakers bureau to give 10 unrelated after-dinner speeches to be arranged by the speakers bureau with various organizations over a six-month period. The employee may not receive the contract fee of $10,000.00. The 10 speeches do not constitute a series of speeches, but 10 individual speeches.[101]

Apparently, the problem faced by the economist was that his speeches not only different, but also *unrelated*. Another example attempted to further explain:

> An employee of the National Aeronautics and Space Administration may accept compensation for a series of three articles on white collar crime she has agreed to write for a local newspaper. While she could not accept compensation for just two articles on white collar crime, she could accept a national journalism award for two articles she had written on an uncompensated basis.[102]

Presumably, her articles were both different and related. The employee reading this example must conclude that the evil to be avoided lies in a series of less than three. Being paid

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[101] *Id*, at .203(a), Example 3.

[102] *Id*, at .203(a), Example 6, encompassing § 2636.203(a)(10) which allows acceptance for awards given on a competitive basis.

for three articles must be ethical, and being paid for fewer than three must, therefore, be unethical. This absurd result of poor draftsmanship, imposed on OGE by Congress, would be used to great effect by the plaintiffs in *NTEU*.[103]

The honoraria ban represents the problem of attempting to codify ethical behavior. The lure of drafting a black-and-white rule is much stronger than trying to instill ethical self-restraint through more general principles. A rule such as this leads to ridiculous and unfair situations. People are deprived of their rightful compensation because of a rule they can not understand. It causes those to whom the rules apply to loose respect for the entire code of ethics, and it holds the profession of civil service up to ridicule. One of the Government's arguments before the Supreme Court in *NTEU* was that the broad ban was easier to administer and enforce than one more tailored to the threat. The Government argued that it "has an interest in avoiding the administrative difficulties that would attach to any rule requiring a substantial number of case-by-case judgments about the

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[103] BRIEF FOR RESPONDENTS at 50, NTEU, *supra*, note 10. The respondents argued that because the ban "discriminates among forms of speech, [this] further compounds the burden it imposes on the exercise of First Amendment rights." "[w]hile the ban singles out certain forms of communication, it leaves employees free to accept compensation from the very same payer, for the very same message, if they package the material differently -- as a three-part series or a book, for example".

appropriateness of particular honoraria."[104] The Supreme Court summarily rejected this weak argument and said that a "blanket burden on the speech of nearly 1.7 million federal employees requires a much stronger justification than the Government's dubious claim of administrative convenience."[105]

V. THE BEGINNINGS OF THE CONTROVERSY AND LITIGATION

The honoraria ban caused controversy long before it was passed by Congress. Newspapers fully reported the huge amounts of honoraria received by Representatives and Senators,[106] but they were also reporting the problems of an all-out ban. *The Congressional Quarterly Weekly Report* devoted a large article to the problems inherent in the honoraria ban, then being debated in Congress.[107] It reported that some members were opposed to the provision that would continue to allow travel expenses to be accepted, and that "the likelihood that members will be able to continue to take expense-paid trips, would turn the reform effort into a sham."[108] Senator Charles E. Grassley, Republican of Iowa, was

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104 BRIEF FOR PETITIONERS at 21-23, NTEU, *supra*, note 10.

105 NTEU, *supra*, note 10, at 1017.

106 See notes 22 and 23 and accompanying text.

107 *Banning Honoraria May Still Leave Loopholes*, 47 Cong Q. Weekly Rep. (Jan 21, 1989) at 111.

108 *Id.*

quoted as saying "[Y]ou're still indebted to the organization, and traveling around still detracts from the time we ought to be giving to the job."[109] The article went into great detail about luxurious travel and accommodations provided by the Tobacco Institute, the liquor lobby, and others, accepted by Congressmen for trips to places such as Palm Springs and Florida. Ralph Nader said "it continues the fraternizing, the wining and dining that spells influence."[110]

The ban, as passed, ended the practice of allowing tax deductions for honoraria given to charity, but the article noted that those contributions still provide political benefit in the form of good public relations. Senator Daniel Patrick Moynihan, Democrat of New York, it reported, set up a charitable foundation with his wife to channel excess honoraria to charity. Democratic Representative Doug Bernard of Georgia gave $6,500.00 in excess honoraria to a foundation in his own name in one year alone.[111] The ban did not end this opportunity.

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[109] *Id.*

[110] *Id*, at 113.

[111] *Id*, at 112.

A. THE BAN TAKES EFFECT

The ban took effect on January 1, 1991, and as that day approached, the controversy heated up. *The Washington Post* reported that the ban would hit the Washington, DC area hard because many of the 360,000 local federal workers wrote for newspapers, magazines, and other journals.[112] The article was right. Freedom of expression would naturally suffer its greatest loss at the hands of the honoraria ban in the area of the country with the greatest concentration of affected employees. In December, 1990, the National Treasury Employee's Union, the American Federation of Government Employees, and several individuals brought three separate suits in the U.S. District Court for the District of Columbia challenging the honoraria ban on First Amendment, vagueness, overbreadth, equal protection, and due process grounds.[113]

One of the individual challengers was Peter G. Crane, a GS-16 employee. Mr. Crane's story was typical of many affected government employees, and *The Washington Post* profiled him in an article written to showcase unfairness of

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[112] Mike Causey, *Moonlighter's Lament*, Wash. Post (Oct. 29, 1990), at D1.

[113] National Treasury Employee's Union v. U.S., 788 F.Supp. 4 (D.D.C. 1002) [hereinafter, NTEU].

the ban.[114] Mr. Crane, an attorney for the Nuclear Regulatory Commission, wrote an editorial for *The Washington Post* criticizing the ban entitled *Arrest Me Officer, I'm Writing!"*. He was paid - *and accepted* - $150.00 from the paper for his efforts. He knew that he had violated the law, and notified the NRC Inspector General's Office (IG) when he was paid. IG officials questioned him for an hour in the presence of his attorney and a court reporter, and then passed the case on to the Justice Department. Crane's interest in fighting the ban, in addition to his status as a federal employee and it's general unfairness, was the fact that he enjoyed researching and writing about Russian and German history, areas unrelated to his job.[115]

The article called the ban part of a "last-minute deal struck by lawmakers in exchange for a pay raise" and quoted "Congressional aides involved in the final negotiations" as saying that the intention of the legislation was to prohibit payment to federal employees that are related to or pose a

[114] Dana Priest, *In New Ethics Order, Fine Lines and Fines; Career Employee Who Accepted Pay for Article Awaits Consequences of His Defiance*, Wash. Post (May 29, 1991) at A17.

[115] *Id.* In 1994, as the litigation dragged on, Mr. Crane wrote another editorial that was published in *The Washington Post*, "Let My People Write". It was a hard-hitting piece that directly tied the honoraria ban to Congressional pay raises. See Peter G. Crane, *Let My People Write*, Wash. Post (February 8, 1994) at A19.

conflict of interest with their official government duties.[116] That, of course, was not what Congress passed. The article pointed out that the statute was so "open-ended" that the "regulation writers, in this case the Office of Government Ethics" included a complete ban on all honoraria.[117] It quoted Stephen D. Potts, director of OGE, who was publicly opposed to the ban, as saying that his office tried to write regulations in keeping with the statute without "broadening the interpretation of prohibited activities." He said the regulations were designed to help employees figure out the law.[118] The article said that the result of OGE's efforts was "a list of examples in the regulations that seem incongruous." It then gave some examples, held up to ridicule.[119]

B. FAILED CONGRESSIONAL ATTEMPTS TO MODIFY THE BAN

The lawsuit and the bad publicity prodded Congress into action. On January 24, 1991, in his "Federal Diary" column in *The Washington Post*, Mike Causey reported that bills had been introduced in the House and the Senate to exempt most federal employees from the honoraria ban, "which was aimed at members

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[116] *Id*, at A18.

[117] *Id*.

[118] *Id*. See also the description of the OGE rule in part IV of this thesis.

[119] *Id*, at A 19.

of Congress [but] also bars rank-and-file workers".[120] He also reported that some federal employees would continue their outside writing and speaking in anticipation of the ban being lifted and because "they don't sense any strong move to enforce the ban."[121] If they were expecting quick Congressional action to lift the ban, they were misguided. Congressional attempts were never successful.

Representative Barney Frank, Democrat of Massachusetts, has continually championed the cause of lifting the honoraria ban off the backs of rank-and-file federal workers. He has not been successful, but has continued to introduce bills into 1995, after the Supreme Court handed down its decision in *NTEU*, to make the ban more fair to workers. In the Senate, it has been Senator John Glenn, Republican of Ohio, who has argued eloquently for the ban's revision.

In October, 1990, before implementation of the ban, Senator Glenn and Senator William Roth, Republican of Delaware, introduced Amendment Number 3195 to § 501(b) of the Ethics in Government Act of 1989.[122] It sought to add a nexus

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[120] Mike Causey, *Aid for Moonlighters*, Wash. Post (Jan. 24, 1991) at D2.

[121] *Id.*

[122] S 3195, *supra*, note 13.

between the employee's appearance, speech, or writing and his official government duties. It would have added a new paragraph to the Act, as follows:

> (2)(A) In the case of an officer or employee described in subparagraph (B), paragraph (1) shall not apply to an honorarium paid to such individual for an appearance, a speech, or an article published in a bona fide publication if --
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> (1) the subject of the appearance, speech, or article and the reason for which the honorarium is paid is unrelated to that individual's official duties or status as such officer or employee; and
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> (ii) the party offering the honorarium has no interests that may be substantially affected by the performance or nonperformance of that individual's official duties.
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> (B) The officers and employees to whom subparagraph (A) applies are any officer or employee other than a Member and other than a noncareer officer or employee whose rate of basic pay is equal to or greater than the annual rate of basic pay in effect for Grade GS-16 of the General Schedule under section 5332 of title 5, United States Code.
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> (C) A report of acceptance of any honorarium accepted under subparagraph (A) shall not exceed the usual and customary fee for the services for which the honorarium is paid, up to a maximum of $2,000.[123]

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[123] 136 Cong. Rec. S17257 (Oct. 26, 1990).

The Glenn/Roth amendment sought to transform the honoraria ban into what the various commission reports intended it to be - a conflicts of interest statute. It did this by injecting a nexus between the employee's appearance, speech, or article and his official government duties. The honorarium could not be for activities related to those duties and could not be offered because of the employee's official status. Thus, under this amendment, our rose-garden expert could be paid for one, three, or fifty appearances before the garden club, as long as she was not talking about her official government duties and the garden club was not trying to curry favor with her because of her official position. The bill also implicitly recognized that there were different reasons for a broad-based bill for senior employees, so it kept it in place for them. Those employees, of course, were to receive a pay raise to blunt the loss of honoraria. Senior employees should be held more accountable to the people because of the importance of their jobs and the effects of their actions. The debate, however, was not about them. It focused on the lower-ranking employees.

Sen. Glenn called the honoraria ban unfair and noted the many calls and letters he had received on the subject. He said "[E]ssentially, this amendment serves the public interest by maximizing the freedom of Federal employees to pursue outside activities while guarding against potential conflicts of interest." He called the amendment "the last best chance before adjournment for Congress to mitigate the harshness of the impending honoraria ban."[124] He asked for, and received unanimous consent that a letter from Mr. Potts of OGE be inserted into the Congressional Record. OGE had long been opposed to the honoraria ban and the letter stated its strong support for the amendment. Mr. Potts said that his office had reviewed the amendment and "[W]e believe that an amendment of this nature will substantially meet our concerns about the effect of the ban on executive branch employees".[125] Senator Roth, in his comments, stressed the overbreadth of the statute. He was concerned that doctors and lawyers would be stymied in efforts to advance their careers through scholarly writing. He also noted that the amendment was drafted as the result of negotiations with Common Cause and Representative Frank.[126]

The amendment failed to pass both houses before the end of the 101st Congress. Senator Glenn, undaunted, introduced an identical amendment in the 102nd Congress in order to "achieve the appropriate balance between maintaining the public's trust in the ethical conduct of its Government and

[124] *Id*, at S17258 (statement of Sen. Glenn).

[125] *Id*.

[126] *Id* (statement of Sen. Roth).

permitting federal employees the freedom and opportunity to pursue professional and personal growth."[127]

The Report of the Committee on Governmental Affairs issued a report recognizing that little attention had been paid to the effect of the ban on rank-and-file employees during Congressional debate on the Ethics Reform Act of 1989. It also noted that three lawsuits challenging the Constitutionality of the ban had already been filed.[128]

The Committee Report eloquently stated the case for reforming the honoraria ban, using many arguments that would be echoed in the pending litigation. Many towering figures of American literature were once government employees whose work may have been stymied had a ban been in place in their days. Walt Whitman, for example, was fired from his job at the Indian Bureau by the Secretary of the Interior because he disapproved of the poems Whitman had published. J. Hubley Ashton, Assistant Attorney General, heard about the firing and promptly hired Whitman at the Justice Department. Ashton was outraged at the very idea that what Whtiman wrote on his own time was of any concern to his bosses. While at Justice, Whitman wrote and published some of his most important works, including "When Lilacs Last in the Dooryard Bloomed."

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[127] 102 S. Rpt. 29 (April 3, 1991).

[128] *Id.*

Nathaniel Hawthorne, Herman Melville, Brett Harte, Washington Irving, and William Dean Howells all supported their writing efforts as government employees. "We should be proud of that tradition and eager to sustain it," the report stated, "not make laws to stamp it out."[129]

The Committee found no evidence of past honoraria abuse by rank-and-file employees, and strongly urged passage of the amendment to free them from the honoraria ban. Mr. Potts testified before the committee and made strong and convincing arguments. He said:

> I continue to believe that a different policy would be more advantageous to the government and less onerous to the many employees that it now affects. Conflict of interest restrictions and standards of conduct are respected by government employees when the restrictions seem fair and clearly related to government employment. When that relationship is not clearly discernible, not only does adherence to that restriction suffer, but the credibility of all the standards that make up the code of conduct for federal employees is undermined. That is why I am very pleased that you have taken up this issue quickly in this Congress. The longer this restriction stays as it is now written, the harder I believe it will be for my office to persuade government employees to respect many of the other standards of conduct.[130]

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[129] *Id.*

[130] *Id.*

Both OGE and the Department of Justice have historically issued opinions on outside speaking and writing that have made clear that the abuse to be avoided is in receiving pay for activities in which an employee appears to be acting as an official agency spokesperson.[131]

On the House of Representatives side, Representative Frank introduced his bill to amend the honoraria ban on January 4, 1991 and eventually received 64 bi-partisan co-sponsors.[132] The bill would have allowed federal officers and employees, (other than Members of Congress and military officers above the pay grade of 0-7)[133] to receive honoraria for expressive activities unrelated to their official duties or status, and from parties with no interests that may be substantially affected by their official duties. It included a $2,000.00 limit per payment, and subjected honoraria acceptance to financial disclosure under the Ethics in Government Act.[134] This version died in committee, and an amended version was introduced by Representative Frank on

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[131] *Id.* See also THE INFORMAL ADVISORY LETTERS AND MEMORANDA AND FORMAL OPINIONS OF THE UNITED STATES OFFICE OF GOVERNMENT ETHICS (1979-1988), at 589.

[132] H.R. 325, *supra*, note 13.

[133] O-7 is the lowest flag officer rank.

[134] H.R. 325, *supra*, note 12.

September 16, 1991, H.R. 3341.[135] It was a more detailed and restrictive version and would have allowed acceptance of honoraria if the subject did not relate primarily to the responsibilities, policies, or programs of the employee's agency or office, and did not involve the use of government time, resources, or non-public information. Like the previous version, it would also have allowed honoraria unrelated to the employee's official duties, and if the payer had no interests that could be affected by the employee's official duties. It set the same $2,000.00 limit per honorarium, and required certain senior officials to notify their ethics counselors before accepting over $200.00 in honoraria from any one source in a year.[136]

H.R. 3341 was far from perfect. It was certainly more confusing and restrictive than Representative Frank's original bill, and the added provision regarding use of government time and non-public government information was redundant of other existing OGE rules.[137] But the bill would have eased the burden on Executive Branch employees. Certainly, our rose gardening employee would no longer have had to worry about her

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[135] H.R. 3341, 102nd Cong., 1st Sess. (1991).

[136] *Id.*

[137] Use of government time was already covered by 5 CFR § 2635.705. Use of non-public information was covered by 5 CFR § 2635.703. Both of these are found in chapter 2 of DOD5500.7-R, *supra*, note 4.

presentations to the garden club. The House passed the bill on November 21, 1991,[138] but it never passed the Senate.[139] Mike Causey reported that "[W]hen the ban was imposed in 1991, everyone assumed Congress would move quickly to eliminate it. It was believed that moving the issue through the courts would take much longer. Today, thanks to the Senate, the Courts appear to be moving faster. Causey pointed out that "[A]ny Senator can delay a vote by putting a hold on a bill" and he pointed the finger at Senator Byrd, Chairman of the House Appropriations Committee. He reported that Senator Byrd did not object to low and mid-grade employees receiving pay for speaking and writing off-duty, but was trying to get support for language that would keep the ban for Congressional staff members.[140]

Representative Frank did not give up easily. He introduced another bill in September, 1992, and it died in committee.[141] He tried again in November 1993, and this bill also died in committee.[142] His latest attempt to amend the

[138] 137 Cong. Rec. H11268 (Nov. 25, 1991).

[139] Mike Causey, *Mikulski Backs Honoraria*, Wash. Post (March 31, 1992) at D2.

[140] *Id.*

[141] H.R. 5935, 102nd Cong., 2nd Sess. (1992).

[142] H.R. 1095, 103rd Cong., 1st Sess. (1993).

honoraria ban was introduced in May, 1995, after the Supreme Court handed down its ruling in *NTEU*. As of the date of this paper, there has been no action on that bill since its referral to several committees on the day of introduction.[143]

VII. *UNITED STATES V. NATIONAL TREASURY EMPLOYEE'S UNION*

The three suits were filed in December, 1990 in the U.S. District Court for the District of Columbia, the plaintiffs seeking declaratory and injunctive relief.[144] On December 20, 12 days before the ban's effective date, the Court

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[143] H.R. 1639, *supra*, note 14.

[144] NTEU, *supra*, note 113. The District Court denied the appellant's requests for a temporary restraining order and a preliminary injunction on the grounds that, although there was a substantial legal question presented, they had not demonstrated that they would sustain irreparable injury. The plaintiffs immediately appealed to the U.S. Court of Appeals for the D.C. Circuit arguing that "the loss of First Amendment freedoms, even for minimal periods of time" may constitute irreparable injury." Judge Clarence Thomas wrote the opinion denying the request. He noted that the only immediate injury the plaintiffs could cite was a loss of the ability to pay the costs associated with their First Amendment activities, but those costs, he correctly found, were allowable under the statute and regulation. Their other arguable losses, loss of income, constituted foreseeable long-term effects, not entitling them to preliminary, injunctive relief. Judge Thomas did, however, rule that the appellants could put their compensation into escrow during the pendancy of the litigation. National Treasury Employee's Union v. United States, 927 F.2d, 1253 (D.C.Cir., 1991)

consolidated the actions and certified NTEU as the class representative for all affected Executive Branch employees below the grade of GS-16.[145] The case, and all subsequent decisions, therefore, only concerned the honoraria ban as applied to the Executive Branch, not the Legislative or Judicial.

The individual plaintiffs were all perfect examples of employees unfairly victimized by the ban. In addition to Mr. Crane, the Nuclear Regulatory Commission attorney and Russian history scholar, there was a mail handler who lectured on the Quaker religion and an aerospace engineer employed at the Goddard Space Center who lectured on black history. There was also a Federal Drug Administration microbiologist who reviewed dance performances, a tax examiner who wrote articles on the environment, and a Navy civilian electronics technician who wrote articles on Civil War ironclads. They were all paid for their efforts, and they all wrote and spoke on topics totally unrelated to their official government duties.[146]

The District Court felt that none of the Supreme Court cases cited by the parties "in the constitutional firmament" were directly on point, however, they "establish what may be

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[145] National Treasury Employee's Union v. United States, 927 F.2d. 1253 (D.C.Cir., 1991) [hereinafter, NTEU], at 1254.

[146] NTEU, *supra*, note 113, at 6, n.1.

considered lines of position, and from the various points at which those lines of position intersect, it is possible to dead-recon to a result."[147] These cases represent the state of the law applicable to First Amendment Rights of government employees as *NTEU* made its way through the courts.

The Courts have long recognized that the federal government may deny certain liberties to citizens entering public service, but that is not absolute. Government workers do not give up all rights. The seminal case in the area of First Amendment rights of Government employees is *Pickering v. Board of Education*.[148] The *Pickering* Court recognized that the government, as sovereign, has interests in regulating the speech of its employees very different from its interests in regulating the speech of the public at large. The government must balance the interests of the employees as citizens "in commenting upon matters of public concern and the interest of the State, as employer, in promoting the efficiency of the public services it performs through its employees."[149] The Government certainly had interests at stake in passing the ban, i.e., promoting the integrity of its workforce and the public's confidence in it. However, the means chosen went far

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[147] *Id*, at 6.

[148] 391 U.S. 563 (1968).

[149] *Id*, at 568.

beyond what was reasonably necessary to achieve those ends. The ban, in its overreaching grip, burdened speech unrelated to employee's duties, where the payer has no interest in the employee's official position, and where no government resources have been used.

In *U.S. v. O'Brien*,[150] a First Amendment case involving non-speech expression (burning draft cards), the Court held that a "sufficiently important governmental interest" can justify "incidental limitations" on First Amendment rights, and that such an interest is sufficiently justified "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[151] The government's interest in preserving the integrity of its workforce is unrelated to the suppression of free expression, and conflict-of-interest regulations further that governmental interest. The honoraria ban's restrictions, however, were far beyond incidental and were much greater than necessary to further the government's interest.

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[150] 88 S.Ct. 1673 (1968).

[151] *Id*, at 1678.

The Supreme Court ended any speculation that financial burdens on free speech implicate the First Amendment in *Simon & Schuster, Inc. v. New York State Crime Victim's Board.*[152] The Court struck down a content-based state statute that prohibited convicted criminals profiting from writing about their crimes. Any profits went to victims. The Court held that the financial burden alone was sufficient to violate the First Amendment. The purpose of the law was victim compensation, but the law was not narrowly tailored sufficiently to that purpose.[153]

Simon and Schuster dealt with a content-specific statute, while the honoraria ban was content-neutral. The Supreme Court dealt with a content-neutral statute in *Ward v. Rock Against Racism.*[154] The case involved a New York City ordinance regulating sound amplification of concerts in Central Park. The Court upheld the statute and held that the government may place time, place, or manner restrictions on protected speech

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[152] 112 S.Ct. 501 (1991).

[153] *Simon and Schuster* was part of a line of cases finding that economic disincentives to speech impact on freedom of expression. See also Riley v. National Federation of the Blind, 487 U.S. 781, 789 n. 5, 790 (1988); Meyer v. Grant, 486 U.S. 414, 422-24 (1988); Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, 967 and n.16 (1984); and Village of Schaumburg v. Citizens for a Better Environment , 444 U.S. 620, 632 (1980).

[154] 109 S. Ct. 2746 (1989).

that are justified without reference to the content, are narrowly tailored to serve a significant governmental interest, and that leave open "ample alternative channels for communication of the information."[155] The Court said that the requirement of narrow tailoring is satisfied "so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[156] Certainly, prevention of conflicts of interest and promotion of ethical behavior are significant governmental interests. Congress was concerned about the erosion of public confidence because of honoraria acceptance by its members (and about receiving a pay raise). The motives alone, however, are not determinative in the Constitutional analysis. Singling out certain types of expressive activity for regulation merits close scrutiny[157] Congress is not required to use the least restrictive means possible to accomplish its goals, but the existence of less-restrictive means (imposition of a nexus test, for example) and lack of fine tailoring left the ban open to First Amendment scrutiny.

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[155] *Id*, at 2753.

[156] *Id*, at 2746.

[157] See Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) and Turner Broadcasting Systems, Inc. v. FCC, 114 S.Ct. 2445 (1994).

The plaintiffs used the terms "overbroad" and "want of narrow tailoring" more or less interchangeably, as the appellate court noted.[158] Both lower courts agreed with the plaintiffs that the statute was overbroad because it burdened so much speech before being uttered, and without regard to its content. They treated the case as a facial challenge citing *Secretary of State of Maryland v. Munson*.[159] The ban certainly reached some impermissible activity, but under *Munson*, that does not save it from facial invalidation. *Munson* would not allow a statute to be invalidated as overbroad when "despite some possibly impermissible application, the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct."[160] That was not, however, the case with the ban, where the "impermissible application[s]" were broad and the "constitutionally proscribable conduct" was narrow.

The honoraria ban was underinclusive in that it singled out only certain types of speech to ban (one article is prohibited, while a series of three or more is permissible; non-fiction is prohibited while fiction is permissible). Thus, under *Minneapolis Star and Tribune Co. v. Minnesota*

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[158] National Treasury Employee's Union v. United States, 990 F.2d 1271 (1993) at 1274 [hereinafter, NTEU].

[159] Munson, *supra*, note 153.

[160] *Id*, at 2850.

Commissioner of Revenue,[161] the statute is subject to close scrutiny and the differential treatment of certain types of speech must be justified "by some special characteristic" to avoid being "presumptively unconstitutional."[162]

Congress imposed the honoraria ban on rank-and-file Executive Branch employees with little or no evidence of any real threat or past practice of impropriety. The most that can be argued is that there was an unsubstantiated potential for abuse. In *Turner Broadcasting System, Inc. v. FCC,*[163] decided while *NTEU* was on appeal to the Supreme Court from the Court of appeals, the Court said that "[T]he Government must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Once it shows this, the government "still bears the burden of showing that the remedy adopted does not burden substantially more speech than is necessary to further such interests (citing *O'Brien*)."[164] The honoraria ban failed on all counts. It was based on little more than conjecture. It's underinclusiveness, picking and choosing certain kinds of

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[161] Minneapolis Star, *supra*, note 157.

[162] *Id*, at 585.

[163] Turner Broadcasting, *supra*, note 157.

[164] *Id*, at 2450. See also O'Brien, *supra*, note 150, and accompanying text.

speech to regulate while leaving others unregulated, kept it from alleviating the harms in a direct and material way. It's overinclusiveness burdened substantially more speech than necessary to further the government's stated interests.

The District Court found the ban unconstitutional as applied to Executive Branch employees. It permanently enjoined enforcement of the ban against them, but stayed the injunction pending completion of timely appeals.[165] The opinion reflected skepticism about the ban and Congress' intentions. It said "[O]ne of the activities Congress found suspect, as tending to corrupt (or appearing so), was the venerable practice of some government officeholders - *most conspicuously, Members of Congress themselves* - of accepting 'honoraria' [emphasis added]"[166]

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[165] NTEU, *supra,* note 113, at 14.

[166] *Id.*, at 5. The Court found that the ban promoted a substantial governmental interest, but said that no matter how important the interest, if the law in question suppresses freedom of expression "to the slightest degree," it can go no farther than necessary to accomplish its purpose. It said that the "sinister 'honorarium'" that the statute was written to "exterminate" presupposes some nexus between the government worker and the payer of the honoraria. No such nexus exists in the ban. The ban, the Court noted, only prohibits appearances, speeches, and articles for pay, not the many other forms of expression for which employees could be paid. *Id.*, at 10. Therefore, it is both overinclusive and underinclusive.

Court of Appeals affirmed on the merits, finding the statute both overinclusive and underinclusive.[167] It noted that a nexus test was required to create the impropriety that was the point of the statute, but felt that creating one was a purely legislative act.[168] It severed § 501(b) as applied to the Executive Branch from the rest of the statute, stating that the issue as to whether an "unconstitutional provision is severable 'is largely a question of legislative intent, but the presumption is in favor of severability'"[169]

[167] NTEU, *supra,* note 158, at 1272.

[168] *Id,* at 1275.

[169] *Id.*, at 1278, citing Regan v. Time, Inc., 104 S.Ct. at 3269. Both Courts addressed the issue of severability and severed the ban as applied to the Executive Branch from the remainder of the Act. The District Court noted the lack of any reference to legislative intent in the legislative history, and the lack of a severability clause. It cited a line of cases ending with Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983), finding that § 501(b) was severable because what remained of the statute "is fully operative as law" and will "function in a manner consistent with the intent of Congress." The Court found it "abundantly clear" that Congressional concern was centered on its own members receiving honoraria, not Executive Branch workers. *Id*, at 12, citing Alaska Airlines v. Brock, 107 S.Ct. 1476, 1480 (1987). For an thorough discussion of severability, see Robert S. Collins, *Ethics and the First Amendment: the Applicability of the Honorarium Ban of the Ethics Reform Act of 1989 to the Executive Branch*, 62 Geo. Wash. L. Rev. 888, 894, an article published after the Court of Appeals decision but before the Supreme Court decision in NTEU.

A. SUPREME COURT ARGUMENTS

Oral arguments before the Supreme Court were scheduled for November 8, 1994. The parties weighed in with lengthy briefs, and a number of *amicus curiae* parties also submitted briefs. The Government presented its twice-defeated argument that the burden placed on employees by the ban was at most a modest one because it did not prevent or punish speech, but only prohibited payment for it. It argued that the employees covered were on the federal payroll, and are thus not likely to be financially dependent on the earnings from prohibited activity.[170] This missed the point of the lower court's *Simon & Schuster* and *Ward* analysis in that a financial burden on free expression does not have to render one destitute in order to violate the First Amendment. The Government argued *United Public Workers v. Mitchell*[171] and *Waters v. Churchill*,[172] two cases that recognized Congress' broad powers to regulate the activities of its employees. In *United Public Workers*, the Court upheld the Hatch Act relying on Congress' finding that political activity affected the integrity of public service and should be broadly regulated.[173] The *Waters* Court upheld the

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[170] BRIEF FOR THE PETITIONERS, *supra*, note 104.

[171] 330 U.S. 75 (1947).

[172] 114 S.Ct. 1878 (1994).

[173] United Public Workers, *supra*, note 171, at 103

discharge of a government employee because of disruptive speech to co-workers in the workplace.[174] The Government used these two cases to argue that Congress may impose broad restrictions on its employees without violating the First Amendment as long as the conduct may be "reasonably deemed by Congress to interfere with the efficiency of the public service."[175] It argued that because any payment "could trigger public concern,"[176] the public would likely be unaware of the responsibilities of individual employees receiving honoraria. It noted that the evidence of abuse of honoraria in the legislative history was confined to Congress, but said that "Congress was entitled to extrapolate from its own experience" to conclude that similar abuses may occur elsewhere in government.[177] It noted that Washington "is a hard-nosed town" and that "[P]eople do not do nice things for you, just to be nice,"[178] therefore, the statute avoided gray areas.

The Government argued its significant interest in promoting the integrity and appearance of integrity of federal

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[174] Waters, *supra*, note 172, at 1882.

[175] BRIEF OF PETITIONERS, *supra*, note 104, at 14, quoting United Public Workers, *supra*, note 171, at 101.

[176] *Id*, at 19.

[177] *Id*, at 21.

[178] *Id*, at 22.

workers and that a narrower ban would leave open avenues of evasion for those seeking improper payments.[179] A broad, prophylactic ban had the further advantage of administrative efficiency. It addressed the government's goals more efficiently and avoided the "significant difficulty" of having to deal with honoraria requests on a case-by-case basis.[180]

Finally, the Government argued in the alternative that, if the Court of Appeals was correct in concluding that the ban had "some unconstitutional applications, the Court's remedy exceeds the scope of the violation. The Court should have invalidated the application of § 501(b) only to cases in which there is no nexus between the speech and the employee's official status."[181]

The Government's position was supported by *amicus curiae* Common Cause, which submitted a brief echoing many of the same arguments.[182] Mike Causey, continuing his coverage of the story in *The Washington Post*, noted that one of the attorneys for Common Cause, former White House Counsel Lloyd Cutler, had actually made an excellent argument against the ban in a March

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[179] *Id*, at 16.

[180] *Id*, at 17.

[181] *Id* at 27, 28.

[182] BRIEF OF *AMICUS CURIAE* COMMON CAUSE IN SUPPORT OF PETITIONERS, *supra*, note 21.

13, 1989 *Washington Post* editorial that he wrote. In it, Mr. Cutler said that "federal employees should not be prevented from pursuing 'rewarding private hobbies that do no public harm and enrich the lives of us all.' Cutler wrote: 'the next Earnest Hemingway may be a lawyer in the Department of Justice.'" Causey noted Hemingway's many non-fiction articles on "war, bullfighting, fishing and hunting, among other things. Each of them would mean a $10,000.00 fine and dismissal from the government, under the statute that Cutler now supports."[183]

The respondents, supported with briefs submitted by *amicus curiae* Public Citizen, Inc.,[184] and The Senior Executives Association,[185] argued the unfair impact of the ban on the respondents. Many could not afford to continue their activities because of expenses not recoverable under the ban, particularly capitol expenses not directly attributable to a particular speech or article. For others, the loss of compensation meant the loss of motivating factors, and for still others, outside constraints prevented them from

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[183] Mike Causey, *Another Angle on Hiring*, Wash. Post (Feb. 26, 1995), at B2.

[184] BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN, INC. IN SUPPORT OF RESPONDENTS, NTEU, *supra*, note 10.

[185] BRIEF OF *AMICUS CURIAE* THE SENIOR EXECUTIVES' ASSOCIATION, NTEU, *supra*, note 10.

publishing without pay. Some publishers will not publish without pay and some professional associations discourage it or will not allow it. The ban also had tax consequences in that it reduced what could be considered business activities, whose expenses are deductible, to the status of hobbies, whose expenses are not.[186] It noted the lack of evidence of abuse by Executive Branch employees in the legislative history, and said that the ban's "irrational scope and lack of any real or perceived justification may have undermined the credibility of the government's ethics standards in general.[187] It noted the respondent's "important historical tradition", as Senator Glenn had done when arguing for his amendment to § 501(b).[188] It listed many great figures of American literature who worked for the government: Nathaniel Hawthorne, Herman Melville, Washington Irving, Bret Harte, Walt Whitman, and Lewis Puller, Jr., the latter being a Pulitzer prize-wining writer who had actually been affected by the ban. He was prohibited from being paid for speeches because he was a DOD employee.[189]

The respondents cited *Simon & Schuster* and *Myer* for the proposition that financial burdens on speech implicate the

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[186] BRIEF FOR RESPONDENTS, *supra*, note 103 at 5, 6.

[187] *Id*, at 7.

[188] See 102 S. Rpt. 29, *supra*, note 127, and accompanying text.

[189] BRIEF FOR RESPONDENTS, *supra*, note 103, at 7.

First Amendment.[190] It cited *Turner Broadcasting* and *Minneapolis Star* and argued that the ban's differential treatment of certain types of speech merits close scrutiny.[191] This suggests that the goal of the regulation is related to suppression of expression "unless justified by some special characteristic [of the written material]."[192] Such a goal is "presumptively unconstitutional."[193] Under *Minneapolis Star*, "even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."[194]

The brief hit hard at the absurdities of the ban, such as the differential treatment of certain types of speech, and the lack of definitions (what is a "book"?). It noted that Mr. Crane "could be fined or fired if he received payment for his 'op-ed' piece in *The Washington Post* criticizing the honoraria ban, but not if he were paid by the National Enquirer to invent a story about octogenarian women giving birth"

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[190] *Id*, at 9.

[191] *Id*, at 10.

[192] *Id*, Quoting from Turner Broadcasting, *supra*, note 157, at 4652.

[193] *Id*, Quoting from Minneapolis Star, *supra*, note 157, at 585.

[194] Minneapolis Star, *supra*, note 157, at 592. See also Arkansas Writer' Project v. U.S., 481 U.S. at 228.

(implicitly noting the exception for fiction).[195] It also chastised the Government's contention that the burden was not severe because the employees were not financially dependent on their outside earnings. It argued, citing *Simon & Schuster*, that financial burdens on free speech implicate the First Amendment because of their "undoubted effect in reducing the overall quantity of speech produced"[196]

The respondents blunted the Government's arguments by arguing that off-duty speech with no nexus to official duties does not give rise to actual or apparent improprieties, hitting at the basic justification for the statute. It noted Congressional and administrative support for amending the ban, citing OGE's opposition and bills that had been introduced in Congress.[197] It called the Government's argument that any payment for employee speech could trigger public concern "irrational" and noted that there was no evidence that the public was particularly suspicious of the types of activities regulated as opposed to other outside, income-producing activities.[198] The respondents characterized the Government's heavy reliance on *United Public Workers* as misplaced. The

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[195] BRIEF FOR RESPONDENTS, *supra*, note 103, at 12.

[196] *Id*, at 13.

[197] *Id*, at 19. See also the discussion of Congressional attempts to modify the ban in section VI of this thesis.

[198] *Id*, at 21.

Hatch Act (the subject of *United Public Workers*) was sustained because of the well-documented threat to employees throughout government. The Hatch Act, unlike the honoraria ban, was designed to *protect* employees from unwarranted pressures within government, as well as to protect the integrity of the workforce in the eyes of the public.[199]

Finally, the respondents argued that the Court of Appeals' remedy was appropriate. The Court identified the ban's fundamental defect as facial, a defect in its construction. Invalidating it only as it applied to cases lacking a nexus, as the Government urged, would have constituted creating a nexus test, something that the Court correctly characterized as a legislative act.[200]

B. THE SUPREME COURT DECISION

The oral arguments were described in *The Washington Post* as "spirited" and reflecting the justices "skepticism" of the law.[201] Justice Breyer contributed to the discussion saying "[The respondents] are civil servants, they don't go around

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[199] *Id*, at 25.

[200] *Id*, at 27.

[201] Joan Biskupic, *Justices Question Honoraria Ban; Limits on Federal Worker' Speech Criticized in Oral Arguments*, Wash. Post (November 9, 1994), at A4.

having thousands of freebies thrown at them." He added that it might be in the government's best interest to have federal workers write about their subjects of expertise." Justice O'Connor pointed out inconsistencies in the law, calling the exception for a series of three or more appearances, speeches, or articles nonsensical.[202]

The arguments were notable for inspiring Justice Thomas, who, as a Judge on the Court of Appeals, had ruled on NTEU's initial request for an injunction,[203] to ask a question from the bench for the first time in over a year. Thomas, who would dissent from the majority opinion, asked an attorney for the respondents whether the government could ban all moonlighting, suggesting that a total ban on all outside employment would not violate the First Amendment. The attorney said that such a statute would not target speech activities and would therefore not have the same First Amendment problems.[204] Justice Thomas' question reflected his strong belief in the right of the Government, as employer, to regulate the activities of its employees and the weight that he would give the employer in the *Pickering* balancing test.

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[202] *Id.*

[203] See note 144.

[204] Biskupic, *supra*, note 201.

The opinion was issued on February 22, 1995, and the decision of the Court of Appeals was affirmed in part, reversed in part, and remanded.[205] Justice Stevens delivered the opinion of the Court, joined by Justices Kennedy, Souter, Ginsburg and Breyer. Justice O'Connor wrote a separate concurrence, while Chief Justice Renquist, joined by Justices Scalia and Thomas, dissented. The majority opinion held that the honoraria ban violates the First Amendment by abridging freedom of speech. The Court began its opinion by noting, like the respondent's brief, the great literary figures who have worked for the government and that when they, like the respondents, accepted government work, they did not relinquish "the First Amendment rights they would otherwise [have] enjoy[ed] as citizens to comment on matters of public interest."[206] The Court noted that, in the past, it had only applied the *Pickering* balancing test in cases where employees spoke as citizens on matters of public concern. It found that the respondents' activities fell into this protected category because they were "addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment"[207]

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[205] NTEU, *supra,* note 10, at 1003.

[206] *Id*, at 1012, citing Pickering, *supra*, note 148, at 1734.

[207] *Id*, at 1013.

The Government's burden in the balancing test was found to be heavy because of the broad sweep of the ban. *Pickering* and its progeny had dealt with *post hoc* analysis of employee speech, but the honoraria ban had an *ex ante* effect of chilling potential speech. The Government, therefore, was required to show that the "interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." The Court found that the Government failed to meet this burden. The ban placed a far more significant burden on respondents than on legislators (whose practices motivated the legislation in the first place, the Court recognized) and "policymaking executives" and would "inevitably diminish [the respondent's] expressive output.[208] It also imposed a significant burden on the public's right to read and hear what they would have otherwise produced. "We cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne."[209]

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[208] *Id*, at 1014, 1015. The Court found that the "absorbing and time-consuming responsibilities of legislators and policymaking executives" leave them little time for creative expression. Furthermore, they often receive invitations to speak on matters related to their official duties, and can receive travel expense reimbursement, making the ban unlikely to reduce appearances by these officials. In contrast, invitations to rank-and-file employees "usually depend only on the market value of their messages."

[209] *Id*, at 1015.

The Court noted that the Government had based its defense of the ban on abuses of Members of Congress, and the appearances of improper influence they raised. It found that Congress could reasonably extend the danger of improper appearances to the judiciary and high-ranking members of the Executive Branch, but found no basis for extending it to all employees below GS-16.[210]

The Court clearly favored a nexus requirement. It found the exception for a series of three or more expressive activities "rather strange", but noted that the nexus requirement it contained reflected Congressional judgment that ethics officials could enforce a statute that included such a test.[211] It called the Government's argument of administrative convenience "dubious." It found it "anomalous" that the Government should single out only expressive activities for restriction when there are so many other outside activities that could have been restricted.[212]

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[210] *Id*, at 1016.

[211] *Id*. The Court noted that "[B]ecause the vast majority of the speech at issue in this case dies not involve the subject matter of government employment and takes place outside the workplace, the Government is unable to justify § 501(b) on the grounds of immediate workplace disruption asserted in *Pickering* and the cases that followed it. *Id*, at 1015.

[212] *Id*, at 1017.

The Court discussed the often-odd exclusions in the OGE rule, such as those allowing sermons, fiction, and poetry, and found that, while they made OGE's job easier, they hurt the credibility of the Government's position that payments for speech unrelated to work jeopardize the efficiency of the federal service. The "speculative" benefits of the ban were not sufficient to justify "this crudely crafted burden on respondents' freedom to engage in expressive activities."[213]

The Supreme Court reversed the Appellate Court to the extent that it struck down the ban as applied to the entire Executive Branch. The Supreme Court opinion was limited to the parties before it, a class including all Executive Branch employees below the Grade GS-16. In doing this, it did not have to pass judgment on the applicability of the ban to senior officials who had received a pay increase. The Court noted that the Government could possibly advance a different justification for a ban only on such senior personnel, presenting a different constitutional question. The Court also declined to craft a nexus test, agreeing with the appellate court that that was a legislative function.[214]

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[213] *Id*, at 1018.

[214] *Id*, at 1019.

Justice O'Connor took the majority to task over its analysis of the *Pickering* balancing test. She felt that they had drawn a line based on a distinction between *ex ante* rules and *ex post* punishments which she felt overgeneralized and posed a threat of undue interference with the government's mission as employer.[215] She felt, however, that the breadth of the ban placed a great burden of justification on the Government, one that it could not meet. The magnitude of the intrusion raised the Government's burden of justification.[216]

She agreed with the majority that loopholes in the ban cast doubt on the gravity of honoraria abuse, singling out the series of three exception that she had asked about in oral arguments. She, however, would have imposed a nexus test and felt that this was entirely in keeping with the Court's severability presidents. She noted Congress' silence on the issue and said that it did not raise a presumption against severability.[217] She felt that the statute was independently functional with respect to its "principal targets, high-level Executive Branch employees and employees of the legislative and judicial branches."[218]

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[215] *Id*, at 1020 (O'Connor, J., concurring).

[216] *Id*, at 1021.

[217] *Id*, at 1023.

[218] *Id*, at 1024.

The dissent conducted its own *Pickering* balancing test and found that the majority had understated the weight given to governmental justifications of the ban and overstated the amount of speech that would actually be deterred.[219] It rejected the majority's *Simon & Schuster* analysis finding that, because the ban was neither content nor viewpoint based, it did not "raise the specter of Government control over the marketplace of ideas."[220] It then moved to it's *Pickering* analysis, in which it gave great weight to the Government's interest in preventing impropriety and the appearance of impropriety. It noted that the Court's underlying theory, that employees below grade GS-16 have little power to confer influence, was seriously flawed, and gave several examples of mid-grade employees whose power to confer influence may be substantial.[221] It agreed with the Government's reliance on *United Public Workers* and said that "the government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as

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219 *Id*, at 1024 (Rehnquist, C.J., dissenting).

220 *Id*., at 1025.

221 *Id*, at 1028. The dissent noted that "[T]ax examiners, bank examiners, enforcement officials, or any number of federal employees have substantial power to confer favors even though their compensation level is below Grade GS-16."

employer."[222] It found the burden on respondent's First Amendment rights to be only a limited one.[223]

The dissent defended the series of three exception saying that "[O]ne is far less likely to undertake a 'series' of speeches or articles without being paid than he is to make a single speech or write a single article without being paid." It felt this demonstrated Congress' concern with inhibiting as little speech as possible. The number of employees undertaking a series would be much smaller than those making individual speeches or writing individual articles, making them easier to police by ethics officials.[224] The dissent disagreed with the majority basing its analysis on the respondent's examples of banned activity, where there was clearly no nexus with official duties, and then broadly holding the ban invalid. The dissent would have imposed a nexus test.[225]

NTEU began to be cited as an important extension of the *Pickering* doctrine shortly after the decision was handed down. The U.S. Court of Appeals for the District of Columbia Circuit

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[222] *Id*, at 1029, quoting Waters, *supra*, note 172, at 1888.

[223] *Id*, at 1030.

[224] *Id*, at 1029.

[225] *Id*, at 1031.

cited *NTEU* as controlling in *Sanjour v. Environmental Protection Agency.*[226] *Sanjour* involved a challenge by EPA employees to 5 CFR § 2635.807, which prohibits the receipt of compensation, including travel expenses, from non-federal sources for teaching, speaking, and writing relating to the employee's official duties. It is very close to the honoraria ban with a nexus test. The Court of Appeals engaged in what it called *Pickering/NTEU* analysis and found that § 2635.807 violated the First Amendment. The Court said that *NTEU* "offers useful guidance on how to apply *Pickering*" to cases involving regulations proscribing a "broad category of speech by a large number of potential speakers."[227] It said that the *NTEU* test for determining the constitutionality of a statute restricting government employee speech requires that the court "must weigh on the employees' side of the balance not only the interests of 'present and future employees' in a broad range of inhibited 'present and future expression,' but also the interests of their 'potential audiences.'"[228] *Sanjour* drew the distinction between *ex ante* rules and *ex post* punishments that Justice O'Connor found to be an overgeneralization.[229]

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[226] 56 F.3rd. 85 (D.C. Cir. 1995).

[227] *Id*, at 91.

[228] *Id*, at 94, citing NTEU, *supra*, note 10, at 1014.

[229] See the discussion of Justice O'Connor's concurrence in notes 214 through 217 and accompanying text. Sanjour was significant in that it was the first case to recognize NTEU in light of its effect on the Pickering balancing test, however,

it was a wrongly decided case with many problems. It mischaracterized 2635.807, ignoring critical parts of the regulation in a rather emotional opinion.

The Court compared § 2635.807 to the honoraria ban and found that § 2635.807 posed a far greater burden on First Amendment rights than did the ban. It based this on the fact that the ban allowed employees to recover necessary costs and travel expenses, and only prevented them "from *profiting* from their outside activities [emphasis in original]." Sanjour, supra, note 226, at 93. The Court said "[B]y denying government employees the ability to recover even necessary travel expenses, the regulations here represent a greater impediment to their attempts to publicize their views than did the honoraria ban". *Id*, at 94. This analysis is amazing and the opposite is true. The honoraria ban imposed a far greater burden on free expression because it burdened a virtually endless array of speech, no matter the topic and no matter the audience. By contrast, § 2635.807 only burdens speech that is directly connected to the employee's official duties. The rule in very similar to the honoraria ban, but the nexus text is a critical difference that severely limits the range of burdened expression. The Court seemed to ignore this difference.

The Court found fault with 31 USC § 1353, and implementing regulations, 41 CFR § 304-1.3(a), which allow Federal agencies to accept payment from non-Federal sources for official travel expenses. Thus, private entities can reimburse the agencies for official travel expenses with agency approval. The Court saw this agency approval as power to censor speech. *Id.*, at 97. The Court said that the danger of government employees accepting travel expenses from private parties bears no relation to the distinction between official and unofficial travel, but from the private source's interest in the employee and his agency. The Court saw the danger as equal regardless of agency approval or disapproval of the reimbursement. *Id*, at 94. EPA apparently abandoned this justification, but it should not have. This analysis ignores the 31 USC § 1353 regulatory scheme. The danger of apparent impropriety is much greater when an employee is being paid by a private source to, in effect, remerchandise his work product for which the taxpayers have already paid, than when an employee is on official travel, delivering an official speech and the agency is being reimbursed. The regulations implementing 31 USC § 1353 require the travel approving authority to go through a complex conflict of interest analysis, considering six factors, before approving agency reimbursement. The approval authority may not approve reimbursement if he determines that acceptance would "cause a reasonable person with knowledge of all the facts relevant to a particular case to question the integrity of agency programs or operations." One of the factors to be considered is the monetary value of the travel expenses offered, so lavish accommodations are hardly a serious problem. Finally, the reimbursement is to the *agency*, not to the employee, and this is not just a game of semantics. The regulations require that payment, other than in kind, must be by check payable to the agency.

The majority felt that whenever an employee travels at private expense it creates the appearance of impropriety, but the safeguards in place for official travel mean that reimbursement is only allowed in the absence of a conflict of interest. When employees, such as the plaintiffs, decide to accept compensation for speeches closely related to their official duties, it creates the impression that they are speaking on behalf of the government, stating an official government position, and yet the majority would give them the power to pick and choose the private organizations to pay for this semi-official travel. The danger of improper appearances and actual improprieties would be very great, indeed.

The majority said that "the benefit accruing to an employee from a week relaxing in four-star hotels and regaling on five-course feasts at the expense of a private party is in no way diminished by first obtaining agency approval." It then accused the government of "not even" attempting to regulate this behavior. *Id.*, at 95. This is, of course, blatantly false. The majority's failure to note the critical distinction and safeguard of the 31 USC § 1353 regulatory scheme is amazing and could only have resulted from a grossly inadequate review of the facts or a choice to ignore those that did not support its argument.

The dissent pointed out that § 2635.807 and 31 USC § 1353 are utterly reasonable. § 2635.807 is directly related to a legitimate governmental interest. Judge Sentelle noted that

C. AFTERMATH OF THE SUPREME COURT DECISION

The Supreme Court treated the case as an "as applied" challenge, limiting the remedy to the parties before the court, the class of Executive Branch employees below Grade GS-16. It disagreed with the lower court's more facial treatment of the statute, which struck it down for all Executive Branch employees who might be affected by this unconstitutional statute. A broader remedy, the Supreme Court felt, would have required dealing with the question of the applicability of the statute to senior executives who received a 25% pay raise to off-set the ban, and for whom a different justification for a honoraria ban could be advanced. It would also have required it to tamper with the text of the statute, which it did not want to do. The Court of Appeals had done so when it struck the terms "officer and employee" from § 501(b) except as applied to Congress and the judiciary.[230]

"[W]hen an employee is paid for his speech and expressive conduct by two 'masters,' his loyalty is [] divided. Protecting against this division and the appearance of the same is a governmental interest recognized as legitimate" in *NTEU*. *Id*, at 101 (Sentelle, J., dissenting).

[230] See the appellate court's discussion of this severance issue at NTEU, *supra*, note 158 at 1279 and note 169 and accompanying text.

The limited remedy was an immediate problem for ethics officials, particularly in the DOD, who were trying to determine to whom the honoraria ban now applied. The ban was lifted only as applied to "all Executive Branch employees below Grade GS-16."[231] However, it reached Executive Branch employees other than the "senior executives" the Court spoke of and those employed under the General Schedule. The ban reached all employees other than special government employees, enlisted members of the military, and the President and Vice President.[232] That left a vast number of employees working at other grade schedules at and below the level of GS-15. These included those working under other equivalent pay systems for certain specialized positions, military officers below the pay grade O-7, and low-paid wage grade employees, such as many custodial workers. A literal reading of the opinion meant that the honoraria ban still applied to all these people. Thus, a GS-15 attorney could accept honoraria, while a wage-grade janitor could not. On June 29, 1995, Judith A. Miller, DOD General Counsel, wrote a letter to U.S. Attorney General Janet Reno asking for guidance on this issue. Ms Miller said that it is "unreasonable to interpret the Supreme Court decision to allow only those civilian employees paid under the General Schedule to accept honoraria as the result would be to

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[231] NTEU, *supra*, note 10, at 1019.

[232] § 501(b), *supra*, note 5.

allow a GS-12 to accept, but make an Army physician who is a Captain (O-4) [sic] decline." She went on to say that it would be possible for a civilian in one DOD component to accept honoraria because he is working under the General Schedule, while another civilian in another DOD component, doing the same work and receiving the same pay, would have to decline honoraria because she is working under another equivalent pay system. Ms Miller asked for guidance and stated that "unless we are directed otherwise, this office will advise Department of Defense employees, both civilian and military, who are paid at a rate equal to a GS-15 or below that the honoraria ban will not be enforced."[233]

Ms Miller was certainly correct that the ruling could lead to inequitable, even absurd results. But obviously, the Court's decision was carefully considered and exactly what was intended. The Court said "we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants."[234] I am lead to the conclusion, however, that the Court's "as applied" decision reflected either a misunderstanding of the extent of the ban's effect or a misunderstanding of the complex nature of the Executive Branch

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[233] Letter from Judith A. Miller, General Counsel of the Department of Defense to The Honorable Janet Reno, Attorney General, U.S. Department of Justice (June 29, 1995).

[234] NTEU, *supra*, note 10, at 1018.

employment system. The opinion only spoke of the respondent class and senior executives and was careful to explain that its remedy meant that it did not have to address the applicability of § 501(b) to senior executives. It also meant, however, it they did not address the applicability of the statute to many other workers who are paid at a rate equivalent to GS-15 and below. These people received no mention at all in the opinion. It was as if the Court did not realize that the ban affected those other workers.

The Court was trying to avoid the severability issue by limiting relief to the parties before the court, thereby not tampering with the language of the statute.[235] The class of employees was so large, however, that severance was the effective result. I agree with the dissent's analysis that the Court "has rewritten the honoraria ban so that it no longer applies to Executive Branch employees below grade GS-16."[236] The Court was trying to avoid the appellate court result which struck the terms "officer and employee" except as applied to Congress and the judiciary.[237] In reality, though,

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[235] *Id*, at 1019 and n. 24.

[236] *Id*, at 1031, n.8 (Rehnquist, C.J., dissenting).

[237] NTEU, *supra*, note 158, at 1279. The appellate court said "[W]e think it a proper form of severance to strike 'officer or employee' from § 501(b) *except* in so far as those terms encompass members of Congress, officers and employees of Congress, judicial officers and judicial employees.[emphasis in original]."

the Supreme Court struck "officer and employee" except as applied to Congress, the judiciary, and Executive Branch employees not working under the General Schedule. I also agree with the dissent's realization that Mr. Crane, who was so passionately involved in the litigation from the beginning,[238] was lost in the shuffle, because he was a GS-16. The Court's rationale does not apply to him, but the opinion apparently does.[239]

Indulging in criticism of the Supreme Court's decision does not change the fact that it has set the law that we must now follow. DOJ issued an opinion addressing Ms Miller's concerns on February 26, 1996, written by Walter Dellinger, Assistant Attorney General.[240] It became DOJ policy two days later.[241] Mr. Dellinger found that *NTEU* "effectively eviscerated 501(b)" and that there exist no remaining

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[238] Mr. Crane was the subject of several articles in The Washington Post, including those he authored himself. See note 115 and accompanying text. The publicity he generated helped prod Congress in its failed attempts to modify the ban.

[239] NTEU, *supra*, note 10, at 1030, n.7 (Rehnquist, C.J., dissenting).

[240] DOJ Memorandum, *supra*, note 16.

[241] Joyce Price, *Panel Eyes Bill Easing Honorarium Ban; Nullification of Law Revives Interest*, Wash. Times (March 7, 1996) at A4.

applications of the statute.[242] He noted that the broad class of plaintiffs for which application of the ban was enjoined drastically curtailed the scope of the ban. He felt that this severed the statute so that the remainder was nothing more than an invalid provision that Congress would not have enacted. He recognized the "preoccupation in the legislative history with an honoraria ban directed at Congress," the seemingly dismissed it as unimportant.[243] He emphasized that the broad ban reflected the decision Congress "actually made."[244] He stressed the need to exercise caution in evaluating Congressional intent and felt that the "drastic reduction in the practical reach of the statute required after NTEU itself suggests that the resulting honoraria ban is not one that is traceable to congressional intent."[245]

The DOJ memorandum stated that "nothing in the legislative history of the honoraria ban indicates that Congress was willing to limit the ban to high-level executive branch officials and legislative and judicial branch employees. This was wrong. The legislative history clearly focused on Congressional misconduct, and there was virtually

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242 DOJ memorandum, *supra*, note 16.

243 *Id.*, at n. 1

244 *Id.*, at n. 1.

245 *Id.*, at n. 2.

no discussion of the ban's application to rank-and-file employees. The DOJ memorandum referenced statements of Senator Mitchell during Senate debate to bolster its proposition that a general honoraria ban was the "heart" of the Act.[246] But Senator Mitchell was talking about the applicability of the ban to the Senate, not the other branches of government. Mr. Dellinger does not mention that Senator Mitchell was engaging in a debate with Senator Helms who said that the Act was really a pay raise bill, not an ethics bill.[247] He also did not mention the response of Senator Paul Grassley, Republican of Iowa, that "[T]he taxpayers are not so concerned about something for which they do not pay [honoraria]. The taxpayers pay our salaries, and that is what they are concerned about."[248] *NTEU* did not eviscerate the honoraria ban, instead, Mr. Dellinger's memorandum eviscerated the Supreme Court opinion.

The DOJ memorandum was attacked in the press. A *Washington Times* article said that Mr. Dellinger "on his own trumped the U.S. Supreme Court by nullifying the law restricting payments to members of Congress for speeches and

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[246] DOJ memorandum, *supra*, note 16, at n.1, referring to 135 Cong. Rec. S 15972, *supra*, note 52 and accompanying text.

[247] 135 Cong. Rec. S 15972, *supra*, note 52.

[248] *Id.*

articles."[249] The article called the legal opinion "extraordinary" and said that "ethics police" had been notified not to enforce the ban.[250]

Mr. Dellinger felt that the Court had engaged in improper severance and left a statute that Congress would not have enacted.[251] The Court did, in effect, engage in severance, but it was not improper severance. Justice O'Connor noted that the statute is still "capable of functioning independently" with respect to senior Executive Branch employees, Congress, and the Judiciary.[252] She noted that the Court's severance was completely in keeping with Supreme Court president.[253]

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[249] Frank J. Murray, *An Assistant at Justice Overrules Supreme Court; Curbs on Hill honorariums Nullified*, Wash. Times (March 6, 1996), at A1.

[250] *Id.*

[251] DOJ memorandum, *supra*, note 16, at n. 1. Mr. Dellinger noted that the "Supreme Court has held that it could not 'dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain" (citing Hill v. Wallace, 259 U.S. 44 (1922), at 70). "Doing so would run the risk of 'creat[ing] a program quite different from the one the legislature actually adopted" (citing Sloan v. Lemon, 413 U.S. 825, 834 (1973)). He said "[W]e believe that any attempt to identify a surviving core to section 501(b) runs afoul of this principle, because what would be left is an entirely different statute from the one Congress intended to enact." This analysis is flawed. The legislative history clearly supports an attempt to curb abuses by senior officials and would support the NTEU decision.

[252] NTEU, *supra*, note 10, at 1024 (O'Connor, J., concurring).

[253] *Id.*

The Court should have addressed the severability issue head-on, instead of trying to avoid it. It should have severed the statute as applied to Executive Branch employees paid at an amount equal to or less than that of GS-15. This would have encompassed all rank-and-file employees and avoided the anomalies that Ms. Miller addressed. There was no severability clause in the statute, but under *Alaska Airlines v. Brock*,[254] such silence does not raise a presumption against severability. In *Brockett v. Spokane Arcades, Inc.*,[255] the Supreme Court noted that partial invalidation "would be improper if it were contrary to legislative intent in the sense that the legislature had passed an inseverable Act or would not have passed it had it known the challenged provision was invalid."[256] The question then becomes, as Justice O'Connor put it, "whether the legislative body would intend the law to be given effect to whatever extent was constitutionally possible."[257] The answer in this case is yes. Justice O'Connor noted that "common sense suggests and legislative history confirms," that the targets of the ban were senior officials of the legislative, judicial, and

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[254] Alaska Airlines, *supra*, note 169, at 1481.

[255] 105 S.Ct. 2794 (1985).

[256] *Id*, at 2803.

[257] NTEU, *supra*, note 10, at 1024 (O'Connor, J., concurring).

executive branches.[258] These were the employees who received the pay raise to off-set the loss of honoraria income. These are the senior policy-makers of Government and, as the majority in *NTEU* noted, the power of senior Executive Branch officials is akin to that of Members of Congress. They are far more likely to be the targets of influence peddlers than rank-and-file employees.[259]

The DOJ policy is a flawed attempt to solve the problems expressed in Ms. Miller's memorandum to the Attorney General. The Court was clear that the opinion only applied to the members of the class, and non-GS employees were not members. I agree that this causes serious problems, but a DOJ position that it will not follow a Supreme Court decision and will not enforce the remainder of the statute is not a proper solution. Ultimately, it is up to Congress to resolve the issues. Congress showed little interest in the matter before Mr.

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[258] NTEU, *supra*, note 10, at 1024 (O'Connor, J. concurring). See the detailed discussion of the legislative history in part II of this thesis.

[259] NTEU, *supra*, note 10, at 1014. The Court noted that "[T]he absorbing and time-consuming responsibilities of legislators and policymaking executives leave them little opportunity for research or creative expression on subjects unrelated to their official responsibilities. Such officials often receive invitations to appear and talk about subjects related to their work because of their official identities."

Dellinger's opinion, but the DOJ position has sparked action on the Hill.[260]

VIII. CONGRESSIONAL ACTION SINCE *NTEU*

The DOJ memorandum has stirred new interest in Representative Frank's latest attempt to amend the Act. *The Washington Times* quoted John Ladd, a staffer on the House Judiciary Committee, as saying that the memorandum has ensured that the panel will take another look at the 1989 Ethics Reform Act.[261] Mr. Ladd said that the committee will likely consider Representative Frank's latest bill, H.R. 1639, which has languished in committee since its introduction on May 15, 1995.[262] Representative Frank's bill would allow Federal officers and employees, other than Members of Congress and "noncareer officers and employees whose rate of basic pay is equal to or greater than that for Level V of the Executive Schedule" to receive honoraria for publications, speeches, and appearances. It would limit the amount of honoraria to the "usual and customary fee" up to $2,000.00.[263] Congress seems

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[260] Joyce Price, *Panel Eyes Bill Easing Honorarium Ban; Nullification of Law Revives Interest* Wash. Times (March 7, 1996) at A4.

[261] *Id.*

[262] H.R. 1639, *supra*, note 14. See also note 143 and accompanying text.

[263] *Id.*

set to act within the next few months. The following section contains a proposal for Congressional action somewhat different from Representative Frank's bill.

A. HONORARIA BAN PROPOSAL FOR RANK-AND-FILE EMPLOYEES

The honoraria ban should not be resurrected for rank-and-file employees, i.e., those paid at a rate equal to or less than GS-15, including military officers in the grade of O-6 and below, and those serving under any and all pay schedules. The Ethics in Government Act should be amended to clearly lift the ban for all such employees, ending the controversy expressed in Ms Miller's letter to Attorney General Reno and the Dellinger memorandum. The legislative history contained no basis for extending the ban to them in the first place, and the courts consistently stressed that fact.[264] The Supreme

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[264] Examples include the following passage from the District Court opinion: "[T]he Task Force Report, even though ultimately recommending a ban on *all* honoraria for *all* employees, follows the foregoing passage with numerous paragraphs suggesting that only the honoraria received by *Members of Congress* was at issue."... "Nothing is said to suggest that the extension *vel non* of Section 501(b) to all federal employees was a 'dealbreaker' provision, and the bill was ultimately passed with provisions that treated even honoraria for Representatives and Senators separately and differently [emphasis in original]." NTEU, *supra*, note 113, at 13.

The Court of Appeals said: [N]owhere [in the legislative history] did members of Congress display any specific concern

Court has placed a heavy burden on Congress to craft a ban that would pass muster under *NTEU,* in which the Court expanded the *Pickering* balancing test. Almost any expressive activity outside the workplace addressed to the public would now constitute matters of public concern. A regulation that chills speech before it occurs must now meet a higher burden than one that deals with *post hoc* analysis of speech. Congress must be able to justify a new ban with evidence that the prohibited expression's impact on the actual operation of government outweighs the interests of potential audiences in hearing it and of present and future employees in expressing it.[265]

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with the receipt of honoraria by executive branch employees". NTEU, *supra*, note 158, at 1278.

The Supreme Court said:

> [T]he Government cites no evidence of misconduct related to honoraria "by the vast rank and file of federal employees below Grade GS-16. The limited evidence of actual or apparent impropriety by Members of Congress and high-level executives cannot justify extension of the honoraria ban to that rank and file, an immense class of workers with negligible power to confer favors on those who might pay to hear them speak or to read their articles. NTEU, *supra*, note 10, at 1008.

[265] See a detailed analysis of the Supreme Court opinion in section VII B. & C. of this thesis.

Congress could create a nexus test so that receipt of honoraria is only prohibited when it is related to the employee's official duties and it would pass muster under *NTEU*. Such a ban, though, is neither necessary nor proper for rank-and-file employees. There is no evidence that honoraria abuse among these employees has ever posed a problem. They are far less likely to be subject to influence-peddlers than more senior employees.[266] Additionally, fairness would dictate that, because they did not receive a pay raise to off-set the loss of honoraria (as senior officials did), they should no longer be subject to the ban.

An employer-employee relationship should be one of mutual trust and fairness. Even if there was a problem, burdening employees with yet another ethics regulation would serve to lessen their respect for the ethics code in general. Over-regulation in the area of ethics leads people to loose sight of what ethics are and what constitutes ethical behavior. The JER should be the base-line of behavior, but too many detailed rules, especially unnecessary ones, lead people to the conclusion that if something is not specifically listed in the

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[266] NTEU, *supra*, note 10 at 1016. The Supreme Court said that Congress could reasonably assume that honoraria acceptance by senior Executive Branch officials would create improper appearances similar to that generated by Congress' own activities. However, this assumption could not be extended to all workers below GS-16 because of their "negligible power to confer favors."

regulation it must be ethical. Inflexible black-and-white rules, like the honoraria ban, do not allow for the many varied ethics questions that confront people. The honoraria ban litigation has shown what results when employees are forced to be "ethical" through bright-line rules devoid of gray area - ridiculous situations in which proper behavior is deemed unethical.[267]

The honoraria ban was never necessary for rank-and-file employees, not only because there was no existing problem with honoraria abuse by them, but also because those types of activities were already prohibited by other ethics rules and regulations. Real and perceived conflicts of interest are fully covered in the OGE rules and, for DOD employees, the JER. 5 CFR § 2635.802 prohibits any outside activity that conflicts with official duties.[268] 5 CFR § 2635.402 is the regulatory version of 18 USC § 208, a criminal conflict of interest statute. It prohibits employees from participating in

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[267] The various expressive activities engaged in by the NTEU plaintiffs are perfect examples of this. They were proper and posed no real threat to the maintenance of an ethical federal workforce. See NTEU, *supra*, note 113, at 6, n.1.

[268] 5 CFR § 2635.802(a) and (b). An outside activity conflicts if it is prohibited by statute or regulation, or would require disqualification from matters so central to the performance of official duties that the ability to perform those duties would be significantly impaired.

official matters in which they have financial interests.[269] 5 CFR § 2635.502 prohibits participation in official matters in which an employee and those with whom he has a "covered relationship", have a financial interest. It also allows for a waiver if the government's interest in his participation in the matter outweighs the improper appearance.[270]

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[269] 18 USC § 208 reads: "An employee is prohibited from participating personally and substantially in an official capacity in any particular matter which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest"

[270] § 2635.502 reads:

> Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of household, or knows that a person with whom he has a covered relationship is or represents a party to such a matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section." paragraph (d) states: "[W]here an employee's participation in a particular matter involving specific parties would not violate 18 U.S.C. 208(a), but would raise a question in the mind of a reasonable person about his impartiality, the agency designee [first-line supervisor in the grade GS-11 or equivalent] may authorize the employee to participate in the matter based

These conflict of interest regulations are representative of the many with which Executive Branch employees must cope. Significantly, 5 CFR § 2635.807 prohibits compensation for teaching, speaking, and writing that relates to an employee's official duties.[271] Clearly, the area is covered and rank-and-

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> on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Factors which may be taken into consideration include:
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> (1) The nature of the relationship involved;
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> (2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
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> (3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
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> (4) The sensitivity of the matter;
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> (5) The difficulty of reassigning the matter to another employee; and
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> (6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

[271] See the discussion of 5 CFR § 2636.807 and the judicial challenge it faces in note 229.

file employees need not be inflicted with any further regulation.

B. HONORARIA BAN PROPOSAL FOR SENIOR EMPLOYEES

NTEU has made it necessary for Congress to amend the ban to reflect the ruling, and a resurrected modified ban applicable only to senior employees can be justified and should be passed. The regulations cited in section A., above apply to senior employees as well as rank-and-file employees, however, senior officials require a different analysis and more regulation of their activities is justified.

The legislative record reflects ample justification for Congress to impose the honoraria ban on itself.[272] The system of accepting honoraria was being abused and received wide media coverage. It had a negative effect on the public's perception of the integrity of it's senior lawmakers. The Wilkey Commission and the Quadrennial Commission both found that accepting honoraria creates the appearance of impropriety in the eyes of the public. There is also justification in the record for extending the ban to senior officials of the other two branches of government. In fact, the Quadrennial Commission found that the practice of accepting honoraria

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[272] See my discussion of the legislative history of the honoraria ban in section II of this thesis.

"also extends to top officials of the Executive and Judicial Branches."[273] The Supreme Court in *NTEU* recognized that preventing improprieties and the appearance of improprieties is "undeniably powerful"[274] and said,

> Congress reasonably could assume that payments of honoraria to judges or *high-ranking officials in the Executive Branch might generate a similar appearance of improper influence*. Congress could not, however, reasonably extend that assumption to all federal employees below Grade GE-16, an immense class of workers with negligible power to confer favors on those who might pay to hear them speak or to read their articles [emphasis added].[275]

It is clear that the Court saw the power, or lack thereof, of the respondents as a key reason for invalidating the ban as applied to them. The Government could not make a strong enough showing that its "underlying concern" that "federal officers not misuse or appear to misuse power by accepting compensation for their unofficial and nonpolitical writing and speaking activities"[276] to meet the *Pickering* balancing test for rank-and-file-employees. But it can make the requisite showing for senior officials, those who the

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[273] FAIRNESS FOR OUR PUBLIC SERVANTS, *supra*, note 24, at vi.

[274] NTEU, *supra*, note 10, at 1016.

[275] *Id.*

[276] *Id*, at 1015.

Court noted, "received a 25 percent salary increase that off-sets the honoraria ban's disincentive to speak and write."[277]

The *NTEU* Court recognized that the power of senior Executive Branch officials is similar to that of Members of Congress, at least insofar as its ability to generate appearances of impropriety.[278] It is well-settled that the regulation of the appearance of a conflict of interest is as important as the regulation of actual conflicts. Both are to be equally avoided. It is enshrined in Executive Order 12674, "Principles of Ethical Conduct for Government Officers and Employees.[279] It was demonstrated by the Wilkey Commission that receipt of honoraria by high-level government officials leads to this appearance.[280] For senior employees, as opposed to rank-and-file employees, the harms of accepting honoraria are "real, not merely conjectural"[281] and an honoraria ban

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[277] *Id*, at 1019.

[278] NTEU, *supra*, note 10, at 1016

[279] E.O. 12674, *supra*, note 61, at § 101(n), states that "[E]mployees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order."

[280] To Serve With Honor, *supra*, note 29, at 35. The report said that "[H]onoraria paid to officials can be a camouflage for efforts by individuals or entities to gain the official's favor."

[281] There are many examples of senior Executive Branch officials whose careers are ruined by unethical behavior. Media scrutiny of their behavior reflects the importance of

their positions, the high standards to which they must adhere, and their susceptibility to those who seek influence at the highest levels of government. Among the more recent examples are former Secretary of Commerce Ron Brown, who was investigated for making large profits from a business in which he invested no money and which made no money, and also for filing inaccurate financial disclosure reports. Editorial, *Now Ron Brown's Investigation*, Wash. Post (May 19, 1995), at A24.

Former Agriculture Secretary Mike Espy was forced to resign when an investigation found that he had accepted improper gifts from companies like Tyson Foods and Quaker Oats, corporations with obvious interests in Department of Agriculture policies. Editorial, *Abner Mikva on Ethics*, Wash. Post (October 17, 1994) at A18. The Espy investigation also included allegations that he improperly billed the government for unofficial trips. Sharon LaFraniere and Susan Schmidt, *Espy Billed U.S. for Monthly trips Home; Agriculture Secretary Says He Regrets "Appearance of Impropriety"* Wash. Post (Sept. 17, 1994) at A1. The probe also extended to at least one of Mr. Espy's aides, Ronald Blackley, who was investigated by the Agriculture Department's Inspector General for allegedly interfering with tough new poultry inspection guidelines. Mr. Blackley was characterized as having a "fairly spotty ethical history even before this episode." Editorial, *Investigating Mike Espy*, Wash. Times (August 11, 1994) at A18. The independent counsel investigation of Mr. Espy even looked into allegations that Henry Espy, Mike Espy's brother, failed to file financial disclosure reports from his unsuccessful run for Congress in 1993. *Espy Brother Failed to File Reports*, Wash. Times (Oct. 25, 1995) at A6.

The scrutiny does not end when senior officials leave government service. For example, former Secretary of Defense Cheney was criticized in the press for "banking nice five-figure honoraria from business audiences" after leaving office. David S. Broder, *Cheney Biding His Time*, Wash. Post (June 20, 1993) at C7.

alleviates them in a "direct and material way," thus meeting the requirements of *Turner Broadcasting Systems* on which the *NTEU* Court relied so heavily.[282]

Senior Executive Branch officials are the chief policy-makers. They wield great influence and their actions directly affect the directions this nation takes. They must be aware of appearances, more so than junior employees, as they are more subject to temptations and the consequences of their unethical behavior more severe. They are more likely to be asked to speak, their opinions are more likely to be sought out, and they are more likely to be targeted by those private interests seeking to influence government. An honoraria ban for senior officials should not include a nexus test, because the power and influence they hold require more stringent regulation. The greater the power an official holds, the greater the temptation to influence-peddlers to find ways to curry favor. Payments for speeches or appearances that are totally unrelated to an employees' official duties can give rise to actual and apparent conflicts of interest given the high-profile nature of senior officials. Even if the payment is not from one seeking to gain influence, the appearance remains. The more powerful a person is, the more difficult it is to imagine someone paying for his expressive activities for reasons unrelated to his status. Add to all of this the 25%

[282] Turner Broadcasting, *supra*, note 157 at 2450.

pay raise and the *Pickering/NTEU* balance is tipped in favor of the Government. An honoraria ban for senior officials would be upheld if challenged.

A new ban must avoid the loopholes and meaningless distinctions among types of speech that marred the old one. The Supreme Court noted that both the Wilkey and Quadrennial Commissions stressed the importance of defining honoraria in such a way as to close potential loopholes that are the substantial equivalent of honoraria.[283] A new ban should also be easier to understand than the existing one, with clear, concise language. I propose the following to replace § 501(b):

§ 1. General Standard

A senior officer or employee may not receive any honoraria while employed by the Federal Government.

§ 2. Definitions

(a) Senior officer or employee means Members of the United States House of Representatives, the United States Senate, Federal judges, Federal magistrate judges, and all officers of employees of the Legislative, Judicial, and Executive Branches of the Federal Government whose basic pay

[283] *Id*, at 1017.

is greater than the maximum rate of basic pay for GS-15 of the General Schedule,[284] regardless of the officer's or employee's position or pay schedule.

(b) Honoraria means the payment of money or anything of value from a non-Federal source for an appearance, speech, or written material. It includes associated travel expenses, meals, and entertainment. It does not include:

(1) Items that may be accepted under applicable standards of conduct gift regulations even though offered by a prohibited source (5 CFR § 2635.201 - .205);

(2) Travel expenses for official travel allowed under 31 USC 1353, 5 USC 4111, or 5 USC 7342;

(3) Witness fees credited under 5 USC 5515 against compensation payable by the United States.

(4) payment for teaching a course by the employee offered as part of a program of education or training sponsored and funded by the Federal government or a state or local government;

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[284] Senior officer or employee is defined as including those paid at a rate greater than GS-15 because that is the group that received the pay raise and GS-15 was the cut-off in the NTEU holding.

(5) An award for artistic, literary or oratorical achievement made on a competitive basis under established criteria; or

(6) payment received for an appearance or speech made or a writing published before [the date of this statute].

(c) Appearance means attendance at a public or private convention, conference, meeting, hearing, event or other gathering and the incidental conversation or remarks made at that time.

(d) Speech means an address, oration, or other form of oral presentation, whether made in person, recorded or broadcast.

(e) Written material means any writing that has been or is intended to be published.

(e) Receive means actual or constructive receipt of the honoraria by the employee so that the employee has a right to exercise dominion and control over it and direct its subsequent use. honoraria is received by an officer or employee:

(1) If it is paid to another person (including charitable entities) on the basis of designation by the employee; or

(2) If, with the employee's knowledge and acquiescence, it is paid to the employee's parent, sibling, spouse, child, or any person who is a member of the employee's household.

This proposed statute was crafted by starting with § 501(b) and the OGE rule, 5 CFR § 2636.202 and 203, and making substantial changes. It is intended to replace both § 501(b) and the OGE regulation. An OGE regulation should be identical with the possible addition of clarifying examples. Many of the exceptions to the term "honoraria" have been left out. This proposed statute is more stringent than § 501(b), but to avoid the appearance of impropriety, the new rule must avoid the loopholes criticized by the Quadrennial Report and *NTEU*. The proposal does not allow travel expenses, for example, for that reason. There is little difference in the negative appearance of a cash payment for a speech and luxury resort accommodations for the employee and a guest. If anything, travel accommodations can give a stronger, and more public appearance of impropriety. News cameras can and have captured high government officials relaxing at tropical resorts at the expense of non-federal entities. The impression is highly damaging.

The meaningless distinctions among types of expressive activity have also been eliminated. A rule that allows payments for poetry and not prose, for example, conflicts with the underlying premise that the appearance of impropriety is not dependent on the subject-matter of the expressive activity. The senseless "series of three" exception so criticized by Justice O'Connor[285] has been eliminated, along with the provisions allowing honoraria to be donated to charity. This closes the loophole criticized in the *Congressional Quarterly Weeekly Review* that charitable donations provide benefits in the form of good public relations.[286]

The term "honoraria" has been kept despite the earlier-expressed reservation that, as used in the statute, the word bears little relation to its proper, common meaning.[287] "Honoraria" is used here as a term of art denoting a specialized rule. Any word used, such as compensation or payment, would also have to be corrupted to fit the rule.

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[285] NTEU, *supra*, note 10, at 1022 (O'Connor, J., concurring).

[286] *Banning Honoraria May Still Leave Loopholes*, *supra*, note 107, at 111.

[287] See note 89 and accompanying text.

IX. CONCLUSION

The honoraria ban was a serious infringement on the rights of rank-and-file Executive Branch employees that was rightfully struck down. It was nothing more than a Congressional pay raise couched in ethical terms and was made overly-broad without proper consideration of the ramifications.

The ban should not be resurrected in any form as applied to rank-and-file employees. Their expressive activities that lead to actual or apparent improprieties are fully regulated in the OGE rules, and for DOD, the JER. Senior employees can and should be subject to more detailed, stringent rules because their power, influence, and high-profile present greater dangers of improper appearances.

NTEU is, in many ways, a remarkable case. It has redefined the *Pickering* analysis and put a greater burden on Government attempts to regulate the expressive activities of its employees. It has raised questions as to applicability that have not been sufficiently answered. The Department of Justice policy that attempted to address the questions essentially nullified a Supreme Court decision it finds difficult to enforce. The status and applicability of the honoraria ban is as muddled as it has ever been. Senior officials continue to wield great power and influence and attract those seeking influence. It is now up to Congress to settle the matter.